#### Message

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**Sent**: 4/16/2019 10:10:19 AM

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Subject: WOTUS filing

Attachments: RSC Public Interest Comment WOTUS Adler - Final.pdf

Hi Brittany,

FYI, yesterday we filed a Public Interest Comment (attached) by Jonathan Adler in the docket of the WOTUS rulemaking.

I've already shared it with Dave Ross & Matt Leopold.

Best regards,

Brian Mannix GW Regulatory Studies Center

# THE GEORGE WASHINGTON UNIVERSITY

## WASHINGTON, DC

Public Interest Comment<sup>1</sup> on

The U.S. Army Corps of Engineers and Environmental Protection Agency's Proposed Rule:

Revised Definition of "Waters of the United States"

Docket ID No. EPA-HQ-OW-2018-0149

RIN: 2040-AF75

April 15, 2019

Jonathan H. Adler<sup>2</sup>

The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Army Corps) proposed rule revising the definition of "waters of the United States" under the Clean Water Act (CWA) does not represent the views of any particular affected party or special interest. In evaluating this proposed rule, this comment draws upon the author's prior research and analysis of the scope of federal regulation under the CWA and related questions of environmental law and policy.<sup>3</sup>

This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

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<sup>&</sup>lt;sup>3</sup> In particular, this comment draws upon the following papers by the author:

<sup>•</sup> Wetlands, Property Rights, and the Due Process Deficit in Environmental Law, 12 CATO SUP. CT. REV. 139 (2012).

#### Introduction

In this rulemaking, the EPA and Army Corps are attempting to bring clarity to the muddy debate over the scope of federal regulatory jurisdiction under the CWA. In particular, the two agencies are proposing a new definition of "waters of the United States," to replace the definition adopted by these same two agencies in 2015. This new definition will identify the scope of waters and related lands that are subject to federal regulation under the CWA.

As proposed, "waters of the United States" would be interpreted to encompass all those waters traditionally considered to be "navigable waters," tributaries to such waters, some lakes, ponds, and ditches, and wetlands adjacent to all such waters. It would not, however, include "interstate waters" as a distinct category of water subject to federal jurisdiction. The proposed definition is both more clearly defined and more circumscribed than that promulgated by the Army Corps and EPA in 1986 and 2015. As such, this definition is more consistent with the text of the CWA and applicable Supreme Court precedent than prior definitions.

According to the agencies, the proposed rule is intended to increase the "predictability and consistency" of jurisdictional determinations by "increasing clarity" as to what constitute "waters of the United States" subject to federal regulation. Decades of litigation and legal conflict over the proper scope of CWA jurisdiction has produced substantial uncertainty as to the precise scope of federal regulation. Although there is no way to prevent additional litigation over the scope of federal regulatory jurisdiction, the agencies are attempting to develop a definition that comports with the Constitutional and statutory limits on federal regulatory authority while simultaneously advancing the CWA's environmental protection purposes. The new definition is also intended to facilitate achievement of the CWA's stated goals of restoring and maintaining the quality of covered waters while respecting the longstanding role of state, local, and tribal governments in regulating local land-use and protecting water resources.

In reviewing comments on the proposed revised definition and developing a final rule, to define "waters of the United States" under the CWA, the agencies should keep three principles in mind:

• First, the agencies' regulatory power is circumscribed by the constitutional limits on federal power, as well as the limits of the power delegated to the agencies by Congress

<sup>•</sup> When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation, 31 HARV. ENVIL. L. REV. 67 (2007).

<sup>•</sup> Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation, 14 Mo. Envil. L. & Pol'y Rev. 1 (2006).

<sup>•</sup> Jurisdictional Mismatch in Environmental Federalism, 14 NYU ENVIL L.J. 130 (2005).

<sup>•</sup> Judicial Federalism and the Future of Federal Environmental Regulation, 90 IOWA L. REV. 377 (2005).

<sup>•</sup> The Ducks Stop Here? The Environmental Challenge to Federalism, 9 SUP. CT. ECON. REV. 205 (2001).

<sup>•</sup> Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation, 29 ENVTL. L. 1 (1999).

- under the CWA. The power to regulate "waters of the United States" is not the power to regulate all water resources with environmental significance.
- Second, insofar as the statutory phrase "waters of the United States" is ambiguous, Congress has delegated to the agencies the authority to make a reasoned policy judgment about how this term should be defined. Thus, any definition of "waters of the United States" necessarily embodies a policy judgment by the agencies.
- Third, in exercising their regulatory jurisdiction, the agencies should focus on those areas where there is the greatest federal interest, including those areas where federal regulation is most necessary to supplement the environmental protection efforts of state, local and tribal governments and non-governmental entities. Such a focus is likely to maximize the value of federal regulation under the CWA and facilitate greater environmental protection efforts by non-federal actors.

Based upon these criteria, the proposed revision to the definition of the "waters of the United States" is a significant improvement over prior definitions, including that adopted in 2015. If the definition contained in the final rule is similar to that which has been proposed, it is likely to provide greater legal certainty for the regulated community and is likely to be less vulnerable to legal challenge than were prior definitions. Additional refinements to the rule and greater consideration of those areas in which the federal government has a comparative advantage in regulating could help focus federal regulatory efforts and do more to maximize the benefits of federal regulation in this area. Such refinements should not come at the expense of clarity and legal certainty, nor should they risk extending the assertion of federal regulatory jurisdiction beyond what is authorized by the CWA or is permissible under the Constitution.

## **Statutory Authority**

This proposed rule is intended to help implement the CWA by defining the scope of federal regulatory jurisdiction under the statute. This regulatory jurisdiction is confined to the "waters of the United States."

The CWA prohibits "the discharge of any pollutant by any person" without an applicable permit.<sup>4</sup> "Discharge of any pollutant" is defined as "any addition of any pollutant to navigable waters from any point source,"<sup>5</sup> and the term "pollutant" is defined broadly to include dredged material, rock, sand, solid and industrial waste, and chemical waste, among other things. 6

<sup>&</sup>lt;sup>4</sup> 33 U.S.C. §1311(a).

<sup>&</sup>lt;sup>5</sup> 33 U.S.C. §1362(12). The full definition reads:

The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

<sup>6 33</sup> U.S.C. §1362(6).

Of particular importance to this rulemaking, the CWA defines "navigable waters" as "waters of the United States." Although the CWA identifies the congressional purposes that motivated the statute's passage, the law itself does not otherwise define the scope this term.

As the Supreme Court has recognized, the decision to define "navigable waters" as "waters of the United States" indicates Congress's intent to reach beyond those waters that are navigable-in-fact. At the same time, the Court has also indicated that the reverence to navigability and Congress's failure to explicitly assert CWA jurisdiction over all waters, water resources, and related lands within the United States indicates that not all waters are subject to CWA jurisdiction. Thus, for example, an isolated intrastate pond is not included within the "waters of the United States" even though it constitutes a "water" and is within the United States.<sup>8</sup>

In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), the Supreme Court rejected the agencies' assertion of CWA jurisdiction over waters that lacked a "significant nexus" to navigable waters. Whereas the "significant nexus" between navigable waters and adjacent wetlands was sufficient for the Court to affirm the agencies' interpretation of "waters of the United States," as applied to such lands, in United States v. Riverside Bayview Homes, the lack of such a nexus precluded approving the agencies' assertion of jurisdiction in SWANCC. Insofar as the agencies' interpretation of the CWA allowed them to assert regulatory authority over waters lacking a "significant nexus" to navigable waters, that interpretation went beyond what was statutorily authorized.

In *Rapanos v. United States* the Supreme Court reaffirmed the central holding of *SWANCC*, albeit by a divided court. <sup>11</sup> In particular, the plurality and separate opinion by Justice Kennedy both embraced the Court's conclusion in *SWANCC* that "waters of the United States" only extend to those waters and wetlands that have a "significant nexus" to truly navigable waters and are "inseparably bound up with the 'waters' of the United States." <sup>12</sup> Although the two opinions comprising the *Rapanos* majority differed in some respects, they both reaffirmed the existence of meaningful limits on federal regulatory jurisdiction and the importance of construing federal jurisdiction narrowly so as to avoid potential constitutional concerns. As Justice Kennedy noted in his concurrence, one purpose of the "significant nexus" requirement is to "prevent[] problematic applications of the statute. <sup>13</sup>

<sup>&</sup>lt;sup>7</sup> 33 U.S.C. §1262(7).

See Solid Waste Agy of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC), 531 U.S. 159 (2001) (holding that "waters of the United States" does not extend to isolated waters and wetlands).

<sup>9</sup> *Id* 

<sup>10 474</sup> U.S. 121 (1985).

<sup>&</sup>lt;sup>11</sup> 547 U.S. 715 (2006).

<sup>&</sup>lt;sup>12</sup> SWANCC, 531 U.S. at 168 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 134 (1985)).

<sup>&</sup>lt;sup>13</sup> 547 U.S. at 743 (Kennedy, J., concurring in the judgment).

As the Supreme Court's decisions reviewing the agencies' interpretations of "waters of the United States" indicates, the existence of a "significant nexus" to navigable waters helps identify the outermost limit of the agencies' regulatory jurisdiction under the CWA. A "significant nexus" marks the outermost limit of federal regulatory jurisdiction. The existence of such a nexus does not, by itself, require federal regulation.

Where the agencies have put forward an interpretation of "waters of the United States" to reach waters or wetlands lacking such a nexus, the assertion of jurisdiction has been rejected. The Court has reached this conclusion on both statutory and constitutional avoidance grounds. As noted in both *SWANCC* and *Rapanos v. United States*, the assertion of regulatory jurisdiction over waters that lack a significant nexus risks exceeding the scope of the federal government's enumerated powers, and the CWA should not be interpreted to justify such assertions of authority.

The scope of "waters of the United States" is somewhat ambiguous, indicating that Congress has delegated authority to the Army Corps and EPA to determine the precise boundaries of their jurisdiction under the act, provided that their conclusions are based upon a permissible interpretation of the relevant statutory text. Under the well-established framework created by *Chevron U.S.A. v. Natural Resources Defense Council*, where Congress has left gaps or ambiguities in a statute, it is generally presumed to have delegated authority to the administering agency (or, in this case, agencies) to resolve such ambiguities and fill such gaps in the process of issuing regulations and otherwise implementing the required regulatory scheme.<sup>14</sup>

Here, Congress authorized the regulation of the discharge of pollutants into "navigable waters," and defined such waters simply as "waters of the United States." In doing so, Congress expressly failed to delineate the precise boundaries of federal regulatory jurisdiction. Therefore, Congress has delegated to the EPA and Army Corps substantial authority to determine the precise scope of federal jurisdiction under the CWA.<sup>15</sup>

The task before the agencies is not to try and identify the best semantic interpretation of "waters of the United States." Nor is it to identify a set of scientifically derived criteria to establish an "objective" basis for federal jurisdiction under the CWA. Rather, the agencies are to adopt a definition that is both consistent with the statutory text as well as with the agencies' reasoned judgment as to how best to fulfill the legislative purposes of the CWA. While scientific analysis of the interconnection among waters and wetlands is relevant to this process, such analyses are not dispositive. Ultimately, the agencies are tasked with making a policy judgment. As the Supreme Court explained in *Chevron*, "an agency to which Congress has delegated policy-making

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<sup>&</sup>lt;sup>14</sup> See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

There is an argument that Chevron deference should not extend to matters that relate to the existence or scope of an agency's regulatory jurisdiction. See, e.g., Jonathan H. Adler & Nathan A. Sales, The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences, 2009 UNIV. ILL. L. REV. 1497 (2009). In 2013, however, the Supreme Court rejected this argument. See City of Arlington v. FCC, 569 U.S. 290 (2013).

responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments." <sup>16</sup>

Justice Kennedy's concurring opinion called upon the agencies to identify those types of waters or those ecological features that can reasonably be assumed to have a sufficient nexus to navigable waters to justify the assertion of jurisdiction under the Act. While the plurality is somewhat more restrictive, it likewise acknowledged the role of the agencies in determining the scope of "waters of the United States." While identifying greater restrictions within the statutory text than did Justice Kennedy, the plurality nonetheless acknowledged that there is "an inherent ambiguity in drawing the boundaries of any 'waters,'" and rather than declare that the statutory text resolved all questions, rejected the agencies' assertion of jurisdiction because it was "not 'based on a permissible construction of the statute." Chief Justice Roberts, who joined the plurality, also wrote separately to underscore the point that the relevant statutory phrase is sufficiently ambiguous for the Army Corps to "enjoy[] plenty of room to operate in developing some notion of an outer bound to the reach of their authority."

Scientific research can, indeed must, inform the agencies assessment of which waters are so inseparably bound up with navigable waters or otherwise implicated by interstate water pollution as to require their regulation as "waters of the United States." Yet science does not, itself, determine which connections are "significant" for the purposes of asserting federal regulatory jurisdiction under the CWA. As the agencies have themselves acknowledged in proposing the 2015 definition of "waters of the United States":

"Significant nexus" is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a "significant nexus." There is a gradient in the relation of waters to each other. <sup>20</sup>

As the agencies further explained when finalizing the 2015 rule:

...the science does not point to any particular bright line delineating waters that have a significant nexus from those that do not. The Science Report concluded that

<sup>&</sup>lt;sup>16</sup> Chevron, 467 U.S. at 865.

<sup>&</sup>lt;sup>17</sup> Rapanos, 547 U.S. at 740; see also id. at 742.

<sup>&</sup>lt;sup>18</sup> *Id.* at 739 (quoting Chevron USA v. NRDC, 467 U.S. 837, 843 (1984)).

<sup>&</sup>lt;sup>19</sup> *Id.* at 758 (Roberts, C.J. concurring).

<sup>&</sup>lt;sup>20</sup> Definition of "Waters of the United States" Under the Clean Water Act, 79 FR 22188.

connectivity of streams and wetlands to downstream waters occurs along a gradient. 21

If a line is to be drawn demarcating the end of federal regulatory jurisdiction, it will ultimately have to be based upon legal and policy concerns. It is permissible for the agency to prefer a clearer and more predictable bright-line rule, such as is provided by portions of the proposed rule, provided the agencies offer a reasoned explanation of their choice and the resulting regulation rests upon a permissible interpretation of the relevant statutory provisions, in this case the phrase "waters of the United States." Just as the EPA in *Chevron* was allowed to adopt a more flexible interpretation of the phrase "stationary source" under the Clean Air Act, the EPA and Army Corps are permitted to adopt a narrower interpretation of the phrase "waters of the United States." Further, as indicated in *Chevron* and subsequent Supreme Court decisions, the fact that prior administrations have reached different policy conclusions and adopted different statutory interpretations does not prevent the agencies from making a different choice today, provided that they acknowledge the change in policy and otherwise engage in reasoned decision-making. <sup>22</sup>

Nowhere in *SWANCC* or *Rapanos* did justices in the majority claim that the agencies are required to regulate all waters or wetlands that may have a hydrological or ecological connection to navigable waters. Both opinions made clear that a demonstrated hydrological or ecological connection between a given water or wetland and navigable waters, by itself, is insufficient for the assertion of federal regulatory authority. Thus, in revising the proposed definition of "waters of the United States," the agencies should be sure not to assert jurisdiction beyond those waters or wetlands that can be reasonably assumed to have a "significant nexus" to navigable waters, yet the mere existence of a connection that may be characterized as "significant" does not necessarily require the assertion of jurisdiction.

While the plurality opinion and Justice Kennedy's concurrence in *Rapanos* recognized limits on the scope of federal jurisdiction under the CWA, these opinions nonetheless left the agencies with substantial leeway in defining "waters of the United States" going forward, provided that the relevant statutory and constitutional constraints are observed.

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<sup>&</sup>lt;sup>21</sup> Clean Water Rule: Definition of "Waters of the United States", 80 FR 37054.

In making this point, the proposed rule mis-cites one of the applicable legal authorities. At 84 FR 4169, the agencies cite *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *FCC v Fox Television*, 556 U.S. 502, 514-15 (2009) (Rehnquist, J.,, concurring in part and dissenting in part)) for the proposition that "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal' of its regulations and programs." While this quotation does come from an opinion by Justice Rehnquist, it is not from the *Fox* decision (which was decided after Chief Justice Rehnquist's death).Rather, as indicated in the D.C. Circuit's *NAHB* decision, this quotation is from Justice Rehnquist's separate opinion in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). *See id.* at 59(Rehnquist, J., concurring in part and dissenting in part). This error is repeated at 84 FR 4195.

### Maximizing the Value of Federal Regulation

Under well-established principles, embodied in EO 12866 on Regulatory Planning and Review:

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.<sup>23</sup>

In the context of defining the scope of CWA jurisdiction, one question the agencies should consider is the extent to which federal regulation is necessary to supplement the environmental protection efforts engaged in by state, local, and tribal governments (in addition to non-governmental conservation organizations).

Federal regulatory resources are necessarily limited. As a consequence, regulatory agencies can maximize the benefits of their regulatory efforts insofar as they concentrate or target their efforts where federal intervention is likely to do the most good, and the least harm. Accordingly, federal regulatory resources are best utilized if they are targeted at those areas where there is an identifiable *federal* interest or where the federal government is in a particularly good position to advance environmental protection, particularly given available alternatives. For example, there is an undeniable federal interest in regulating the filling or dredging of wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized, the federal interest is less clear. Not coincidentally, in the latter case, the basis for federal jurisdiction is also more attenuated.

Federal regulation of private conduct is not the only means for protecting water quality and conserving wetlands. Both prior to and since the enactment of the CWA, state and local governments have been active participants in water quality protection and wetland conservation efforts. Federal regulation, while often filling needed gaps in the protection offered by state and local governments, also has the potential to hamper or discourage such efforts and compromise the discovery process that can result from allowing different jurisdictions to experiment with different approaches to common problems.<sup>24</sup>

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<sup>&</sup>lt;sup>23</sup> Exec. Order No. 12866, Regulatory Planning and Review, §1(a).

<sup>&</sup>lt;sup>24</sup> For an extended discussion of how federal regulation can influence state-level regulation see Adler, *When Is Two a Crowd?*, at 81-106.

The importance of considering non-federal regulation was stressed in OMB Circular A-4, which noted:

The advantages of leaving regulatory issues to State and local authorities can be substantial. If public values and preferences differ by region, those differences can be reflected in varying State and local regulatory policies. Moreover, States and localities can serve as a testing ground for experimentation with alternative regulatory policies. One State can learn from another's experience while local jurisdictions may compete with each other to establish the best regulatory policies. <sup>25</sup>

In order to ensure that the agencies are fulfilling a genuine environmental need, and not adopting a more expansive definition of the "waters of the United States" than is necessary, the agencies should consider the extent to which non-federal entities can and are likely to engage in relevant environmental protection efforts and, to the extent that such non-federal efforts are insufficient to meet the stated goals of the CWA, how federal resources and assertions of jurisdiction may be focused so as to maximize their relative contribution. The value of federal regulation in this area will be maximized by focusing federal resources on those waters and resources least likely to be protected or conserved by non-federal actors.

In considering the extent to which federal intervention is necessary or desirable, distinguishing between different potential justifications for federal intervention is important. In particular, just as EO 12866 anticipates that agencies will consider when "market failure" justifies government regulation, the EPA and Army Corps should consider the extent to which non-federal actors, including state, local, and tribal governments, will "fail" to engage in sufficient environmental protection efforts. <sup>26</sup>

In the context of water pollution control and wetland conservation, there are several different possible rationales for federal intervention. Perhaps the most prominent, and most well-substantiated, is the claim that state and local governments are unlikely to provide sufficient levels of environmental protection due to the presence of interstate spillovers, such as occurs when pollution crosses state lines and when resources span across multiple jurisdictions.

Where activity in State A causes pollution in State B, there is an almost unimpeachable case for federal involvement, even if only to adjudicate the relevant dispute.<sup>27</sup> While one may reasonably

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Office of Management and Budget, Circular A-4, "Regulatory Analysis" (Sept. 17, 2003) at 6; see also Exec. Order 13132, Federalism.

<sup>&</sup>lt;sup>26</sup> Id.

<sup>&</sup>lt;sup>27</sup> See, e.g., Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 DUKE L.J. 931 932 (1997) ("Given the inherent difficulties in regulation by any single state, transboundary pollution would seem to present a clear

expect State A to adopt measures to control the environmental costs of economic activity within State A, policymakers have little reason to be concerned with the harms imposed on other jurisdictions. As a consequence, State A is unlikely to adopt sufficient controls to prevent environmental harm within State B because it would bear the primary costs of any such regulatory measures, whereas the primary beneficiaries of such controls would be elsewhere. Indeed, absent some external controls or dispute resolution system, the presence of interstate spillovers can actually encourage polices that externalize environmental harms, such as subsidizing development near jurisdictional borders so as to ensure that environmental harms fall disproportionately "downstream." Policymakers in State B may wish to take action, but they will be unable to control pollution created in State A without the cooperation of State A. Even where polluting activity imposes substantial environmental harm within State A, the externalization of a portion of the harm is likely to result in the adoption of less optimal environmental controls.

Not all spillovers take the form of State A externalizing the costs of polluting activities onto State B. In some cases, States A and B share in a common resource, such as a watershed or airshed. In such contexts the spillover effect is reciprocal, insofar as each state that shares in the common resource has the ability to externalize the effects of its polluting or resource depleting activities on the others, and a "tragedy of the commons" is likely to result. <sup>28</sup> As with the more direct spillover, however, one cannot reasonably expect states, acting alone, to adopt welfare-enhancing environmental protections as the regulating state will bear a disproportionate share of the costs from such regulation with no guarantee of reaping proportionate benefits. While interstate compacts and other mechanisms are sometimes available to facilitate the management and protection of cross-boundary resources, some form of federal intervention may be necessary to ensure the proper level of environmental protection.

Because of the particular problems that result from interstate spillovers, and the incentives faced by states that share transboundary or interstate water resources, the EPA and Army Corps should pay particular attention to whether the proposed rule provides adequate protection for interstate waters. As proposed, the revised definition of "waters of the United States" does not specifically identify interstate waters as "waters of the United States." This omission is potentially concerning on both statutory and policy grounds.

On statutory grounds, it would seem that of all non-navigable waters, those that touch and concern more than one state fit more securely within the definition of "waters of the United States" than those contained wholly within a single state. The latter may simply be "waters of the state." The former cannot.

case for shifting regulatory authority from local to more centralized levels of governance."); Richard Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996).

<sup>&</sup>lt;sup>28</sup> See generally Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968).

On policy grounds, there are strong reasons to believe that interstate waters are among those waters most vulnerable in the absence of federal regulation. Therefore, insofar as the Army Corps and EPA seek to maximize the net benefits of regulation under the CWA, particular attention should be made to the decision to omit special consideration for interstate waters.

It may be true, as noted in the proposed rule, that most interstate waters will be otherwise included within the definition of the "waters of the United States." Yet the agencies also acknowledge the lack of any firm analytical foundation for this presumption. Given that interstate waters are readily included within the statutory phrase and that the nature of transboundary resources makes federal action particularly appropriate, the agencies should reconsider the exclusion of interstate waters as a separate category within "waters of the United States." If, as the agencies admit, they "lack the analytical ability" to determine the implications of this omission, it is not clear that this aspect of the definition would satisfy the requirements of reasoned decision-making.

A second argument that is made for federal regulatory intervention is that in the absence of federal regulation, interstate competition will result in suboptimal regulation across jurisdictions as states "race to the bottom." Unlike the concern for spillovers and transboundary resources, interjurisdictional competition does not counsel in favor of a more expanded federal regulatory role.

The race-to-the-bottom theory presumes that interjurisdictional competition creates a prisoner's dilemma for states. Each state wants to attract industry for the economic benefits that it provides. Each state also wishes to maintain an optimal level of environmental protection. However, in order to attract industry, the theory holds, states will lower environmental safeguards so as to reduce the regulatory burden they impose upon firms. This competition exerts downward pressure on environmental safeguards as firms seek to locate in states where regulatory burdens are the lowest, and states seek to attract industry by lessening the economic burden of environmental safeguards. Because the potential benefits of lax regulation are concentrated among relatively few firms, these firms can effectively oppose the general public's preference for environmental protection regulation. This will lead to social welfare losses even if environmental harm does not spill over from one state to another

The race-to-the-bottom argument is probably the most common argument for federal environmental regulation, particularly for wholly or largely intrastate environmental problems, such as local air or water quality. Despite its currency, the theory has been subject to substantial criticism, and empirical evidence that interjurisdictional competition produces downward pressure on state-level environmental regulations is almost wholly absent. As documented in recent literature reviews, there is little evidence for any race-to-the-bottom in environmental regulation,

and some evidence (albeit limited) that the adoption of environmental measures in one state increases the likelihood of the adoption of similar measures by neighboring states.<sup>29</sup>

State regulatory behavior does not suggest the existence of a race to the bottom in the context of water quality or wetland protection. Focusing on wetlands, if the race-to-the-bottom theory were accurate, one would expect states to lag behind the federal government in developing programs to protect wetlands, and states with the greatest proportion of wetlands to be slower to protect wetlands than those with a lower proportion of wetlands. Assuming that limiting the use and development of wetlands imposes costs on industry and discourages economic investment, these costs will be greatest in states with the greatest proportion of wetlands that might be burdened by regulation. At the same time, the marginal cost of developing an acre of wetlands will be less in states with the greatest proportion of wetlands because such development will have a smaller proportionate impact on that state's wetland inventory and, presumably, the ecological benefits that the wetlands provide. From this one can outline a testable hypothesis: "As a general rule, the larger a state's wetland inventory, the more important it is to the nation, but the less important saving it may appear to the state itself—indeed, the more onerous the burden of protecting it will appear." <sup>30</sup>

The history of state wetland regulation, however, paints quite a different picture. Not only did states not wait for the federal government to begin regulating wetlands, but the order in which states began to act is the precise opposite of what the race-to-the-bottom theory would predict.<sup>31</sup> Specifically, those states with the largest wetland acreages tended to regulate first, where as those states with less wetland acreage regulated later, if at all. Further, despite the existence of federal wetland regulation since 1975, many states have adopted programs that reach beyond federal requirements. The observed pattern of state regulation seems to be driven as much by local knowledge and experience with the value of ecological resources as it is by any interstate competitive pressures. More broadly, there is evidence that state and other efforts to address water pollution began to produce benefits prior to the enactment of the CWA.<sup>32</sup> However inadequate

See Daniel L. Millimet, Environmental Federalism: A Survey of the Empirical Literature, 64 CASE W. RES. L. REV. 1669 (2014); Bruce G. Carruthers and Naomi R. Lamoreaux, Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards, 54 J. Econ. LIT. (2016); see also PAUL TESKE, REGULATION IN THE STATES (2004); Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation, 67 N.Y.U. L. REV. 1210 (1992).

Oliver A. Houck & Michael Rolland, Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States, 54 MD. L. REV. 1242, 1253 (1995).

<sup>&</sup>lt;sup>31</sup> This history is summarized in Adler, Wetlands, Waterfowl and Mr. Wilson, at 41-54.

See, e.g., David A. Keiser & Joseph S. Shapiro, Consequences of the Clean Water Act and the Demand for Water Quality, NBER Working Paper No. 23070 (June 2018); see also A. Myrick Freeman, Water Pollution Policy, in Public Policies for Environmental Protection 114 (Paul Portney ed., 1990)(noting pre-CWA improvements in water quality).

such efforts may have been, the history does not support a presumption that interjurisdictional competition is a barrier to non-federal environmental protection efforts.

Adopting a clear definition of "waters of the United States" that provides regulatory certainty is not only beneficial for the regulated community. It may also help facilitate environmental conservation efforts by non-federal actors, including state and local governments. State policymakers are more likely to act when they are more certain of the potential benefits of their interventions. Insofar as the agencies would like non-federal actors to help fill any gaps created by legal limits on federal jurisdiction, they should provide a clear and stable definition of "waters of the United States" so that state and local policymakers are able to identify where their respective efforts are most needed and will be the least duplicative.

#### Conclusion

The proposed revision of the definition of "waters of the United States" is a substantial improvement over prior definitions, not least because it acknowledges the statutory and constitutional limits on federal regulatory jurisdiction under the CWA and takes seriously the need for greater clarity and certainty about the scope of federal regulatory jurisdiction. In reviewing comments and revising this proposal, the agencies should acknowledge that the decision to adopt a particular definition of "waters of the United States" is ultimately a policy decision, albeit a policy decision informed by statutory text and scientific understanding. The agencies should resist efforts to re-extend their assertion of jurisdiction beyond that which has been clearly authorized by Congress under the CWA, as interpreted by the Supreme Court. Similarly, the agencies should resist pressure to muddy the definition of "waters of the United States," as a lack of clarity in the definition will generate needless uncertainty, which can itself discourage environmental protection efforts by non-federal actors. The agencies should also reconsider whether failing to include "interstate waters" as a category of waters subject to regulation is consistent with the text and purpose of the CWA, and use the definition of "waters of the United States" to help focus federal regulatory efforts where federal intervention is most necessary and most beneficial.

#### Message

From: Myron Ebell [Myron.Ebell@cei.org]

**Sent**: 5/21/2019 8:58:51 PM

To: Myron Ebell [Myron.Ebell@cei.org]

Subject: Cooler Heads Coalition alert: Here is the EPA directive on cost-benefit analysis

I sent my earlier e-mail just before someone forwarded EPA's press release, which has a link to the memo, which is at <a href="https://www.epa.gov/environmental-economics/administrator-wheeler-memorandum-increasing-consistency-and-transparency">https://www.epa.gov/environmental-economics/administrator-wheeler-memorandum-increasing-consistency-and-transparency</a>

From: EPA Press Office press=epa.gov@cmail20.com On Behalf Of EPA Press Office

Sent: Tuesday, May 21, 2019 4:17 PM

To:

Subject: Administrator Wheeler Sends Cost-Benefit Analysis Memo To Agency Leaders

# EPA Administrator Wheeler Sends Cost-Benefit Analysis Memo to Assistant Administrators

## Memo Directs Agency Leaders To Reform How Costs and Benefits Are Considered in Our Rulemaking Process

WASHINGTON (May 21, 2019) - U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler <u>signed a recent memo</u> directing agency leadership to develop rules for notice and comment that outline how benefit-cost considerations will be applied to future rulemakings. This action supports the Trump Administration's efforts to identify regulations that impose costs that exceed benefits, providing clarity, transparency and consistency in how regulations are written.

Administrator Wheeler outlines the following principles be followed in developing the regulatory proposals:

- Ensuring the agency balances benefits and costs in regulatory decisionmaking.
- Increasing consistency in the interpretation of statutory terminology.
- Providing transparency in the weight assigned to various factors in regulatory decisions.

• Promoting adherence to best practices in conducting the technical analysis used to inform decisions.

A link to the memo is available here on EPA's website.

The Death Section

Myron Ebell
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Stop continental drift!

#### Message

From: Myron Ebell [Myron.Ebell@cei.org]

**Sent**: 5/21/2019 8:49:05 PM

To: Myron Ebell [Myron.Ebell@cei.org]

Subject: Cooler Heads Coalition alert: EPA directive to re-write cost-benefit analysis rules

Here's the Bloomberg story. Below that I have pasted CEI's statement, which is just going out now. Please support Wheeler's action. The 'viros are going to react strongly, as you can see already in the quotes from the Bloomberg story.

#### **EPA Plans to Rewrite Costs and Benefits of Anti-Pollution Rules**

Bloomberg Jennifer A. Dlouhy May 21, 2019

https://www.bgov.com/core/news/#!/articles/PRVC3B6KLVR8

The Trump administration is planning to write new rules for how it weighs the human costs and benefits of environmental regulations, a move that could make it harder for future presidents to stiffen limits on pollution and combat climate change.

EPA Administrator Andrew Wheeler directed top agency officials to develop the changes, casting them as necessary to eliminate inconsistencies in assessing regulations. Environmentalists say the agency is altering its math to shrink estimates of how many lives are saved by rules governing clean air, chemicals and water contamination.

"Benefits and costs have historically been treated differently" depending on the Environmental Protection Agency office and underlying laws at play, Wheeler said in a May 13 memo obtained by Bloomberg News. In some cases, "the agency underestimated costs, overestimated benefits or evaluated benefits and costs inconsistently."

Wheeler's May 13 memo does not lay out specific changes, other than prescribing the use of "sound economic and scientific principles."

The formal rulemaking initiative builds on other efforts by President Donald Trump's EPA to discount the health benefits of environmental regulations and limit what scientific research that can be used to justify them. Because it would take the form of federal rulemaking that could be finished during Trump's first term the changes could bind future administrations until they could be rewritten.

The efforts are part of a "systematic" effort to downplay how much clean air rules help save lives, said John Walke, clean air director at the <u>Natural Resources Defense Council</u>. The administration has repeatedly sought to "deny that there are benefits, lives saved and monetizable benefits from reducing deaths below air quality standards."

Advocates, including manufacturers and other businesses that chafed against <u>Obama</u>-era environmental regulations, say the agency has too often given short shrift to the potential price of some mandates and relied on inflated estimates of spared premature deaths and hospital visits to justify what they regard as burdensome rules.

The EPA has already <u>proposed ignoring</u> broad benefits that spring from limiting power plant emissions of mercury, including ancillary reductions in airborne particle pollution -- and associated heart and lung disease -- that isn't directly targeted by the mandates. The EPA's science advisers on Monday outlined plans for <u>reviewing</u> how the agency estimates and uses such potential indirect benefits. And agency officials have <u>signaled</u> disregarding further health benefits tied to paring the amount of fine particulate matter in the air below an existing EPA standard of 12 micrograms per cubic meter

The EPA is also working to finalize a rule limiting scientific data and studies that could be used to guide regulations, after proposing limits that would bar reliance on research that can't be reproduced or where the underlying data are not public. Public health experts say the proposed measure would rule out long-term epidemiological and public health studies, including the Harvard "six cities" study that linked dirty air to shorter lives — and underpins EPA anti-pollution mandates.

The Trump administration has been trying "to inaugurate a new way of looking at benefits," former EPA Acting Administrator for Air Quality Janet McCabe said at a House hearing on mercury regulation Tuesday.

Wheeler's May 13 memo told assistant EPA administrators to develop reforms to benefit-cost analysis that ensure consistent use of key terms in federal law, such as what is "practical," "appropriate," "reasonable" and "feasible" — frequent benchmarks for mandates on pollution-controlling technology. Wheeler said the first of these rules should come from EPA's Office of Air and Radiation, which is tasked with implementing standards on ozone, limits on particulate matter and curbs on power plant emissions.

The agency also will update its internal guidelines for analyzing the economics of regulations, including new counsel on what methodologies, assumptions and models should be used to vet rules.

Federal agencies undertake formal analyses of regulations to assess the potential compliance costs for businesses and consumers, as well as the financial value of their benefits, whether reducing asthma attacks or electric power demand. In a 2017 executive order, Trump directed his agencies to identify regulations that "impose costs that exceed benefits."

"With these improvements to our regulatory decisionmaking, the EPA is taking another step to provide the public with a more open federal government and more effective environmental and public health protection," Wheeler said.

# **CEI Applauds EPA Directive to Improve Cost-Benefit Analysis of Environmental Regulations**

According to a report by Bloomberg News, Environmental Protection Agency (EPA) Administrator Andrew Wheeler directed EPA leadership to write new rules for how it weighs the costs and benefits of environmental regulations. In a memo, Administrator Wheeler instructs staff to use "sound economic and scientific principles" when rewriting the rules.

## Director of CEI's Center for Energy and Environment Myron Ebell said:

"Administrator Wheeler's directive to improve the ways cost-benefit analysis is used to formulate pollution rules is a most welcome initiative. EPA over the years has twisted their analysis of costs and benefits to justify rules that in reality cost far more than any direct

benefits. Finding huge ancillary or collateral benefits to offset enormous costs of Clean Air Act rules that have miniscule direct benefits has been an especially objectionable misuse of costbenefit analysis. We hope that Administrator Wheeler's directive will result in new rules that at least curb the worst abuses."

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Stop continental drift!





August 13, 2018

EPA Docket Center Docket ID No. EPA-HQ-OA-2018-0107 RIN 2010-AA12

Re: Comments on EPA Advance Notice of Proposed Rulemaking, "Increasing Consistency and Transparency on Considering Costs and Benefits in the Rulemaking Process," 83 Fed. Reg. 27,524 (June 13, 2018).

Dear Sir or Madam:

We are writing to offer comments of the American Forest & Paper Association (AF&PA) and the American Wood Council (AWC) on an Advance Notice of Proposed Rulemaking (ANPRM), published June 13, 2018 (83 Fed. Reg. 27,524), which seeks comment on whether and how the U.S. Environmental Protection Agency (EPA) should provide a consistent and transparent interpretation relating to the consideration of weighing costs and benefits in making regulatory decisions. EPA also solicits comment on whether and how these regulations also should prescribe specific analytic approaches to quantifying the costs and benefits of EPA regulations.

#### I. Introduction

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - <a href="Metter Practices">Better Planet 2020</a>. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to

assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products. AF&PA and AWC work together to advance policies on issues of mutual concern, including regulatory reform.

While all regulatory agencies could benefit from more rigorous benefit-cost analysis and implementation of their regulatory statutes, the issue is particularly important for EPA, given its powerful impact generally on regulatory policy and specifically on manufacturing and AF&PA and AWC members. Over the last decade, EPA regulations have accounted for 70 percent of all monetized regulatory costs from executive agencies and an estimated 80 percent of all monetized regulatory benefits. Moreover, manufacturing is one of the most heavily regulated sectors in the U.S. economy. Since 1981, manufacturers have been subject to over 2,200 different regulations, and almost half were from EPA.

Accordingly, AF&PA and AWC support EPA's efforts to be more consistent, rigorous and transparent in its use of benefit-cost analysis to ensure regulations are cost-effective and do more good than harm.

II. Consistent with longstanding presidential orders and recent Supreme Court precedent, EPA should reinterpret its regulatory statutes to implement them through a benefit-cost balancing standard, unless prohibited by statute.

#### A. Background

Over time, a remarkable consensus has developed to promote the use of benefit-cost analysis<sup>3</sup> in regulatory decision making. There is a striking similarity among the principles for benefit-cost balancing and centralized review of regulation required by every president for over 37 years.<sup>4</sup> As the Clinton Administration explained in the Office

<sup>&</sup>lt;sup>1</sup> See Office of Management and Budget, Draft 2017 Report to Congress on the Costs and Benefits of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (Feb. 23, 2018), at p. 12.

<sup>&</sup>lt;sup>2</sup> See Paul Bernstein et al., *Macroeconomic Impacts of Federal Regulation of the Manufacturing Sector*, NERA Economic Consulting & Manufacturing Alliance for Productivity and Innovation (2012).

<sup>&</sup>lt;sup>3</sup> The term "benefit-cost analysis" can be used interchangeably with "cost-benefit analysis."

<sup>&</sup>lt;sup>4</sup> In 1981, President Ronald Reagan issued Executive Order 12291, establishing general requirements that, "to the extent permitted by law: (1) "[r]egulatory action shall not be undertaken unless the *potential benefits to society* for the regulation outweigh the potential costs to society," and (2) "[r]egulatory objectives shall be chosen to maximize the net benefits to society" (Emphasis added). Similarly, President Clinton's E.O. 12866, issued in 1993 and still in effect, requires that agencies, to the extent permitted by law: (1) "propose or adopt a regulation only upon a reasoned determination that the *benefits of the intended regulation justify its costs*," and (2) "in choosing among alternative regulatory approaches, . . . select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive effects; and

of Management and Budget's (OMB's) first Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997):

"[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.

The only way we know how to distinguish between regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits." (p. 10)

While this consensus is laudatory, more work needs to be done. The presidential orders directing agencies to implement regulatory statutes through benefit-cost balancing have been less effective than intended for many reasons,<sup>5</sup> including the severe and chronic under-funding of OMB's Office of Information and Regulatory Affairs (OIRA).<sup>6</sup> But one of

equity) unless a statute requires another regulatory approach" (Emphasis added). President Obama's E.O. 13563, issued in 2011 and still in effect, reaffirms the Clinton order and more strongly embraces quantitative benefit-cost balancing, adding a new principle promoting quantitative benefit-cost analysis and risk assessment: "In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

<sup>&</sup>lt;sup>5</sup> See John D. Graham and Paul R. Noe, "Beyond Process Excellence: Enhancing Societal Well-Being," in *Achieving Regulatory Excellence*, Brookings Institution Press (2016) (discussing the institutional impediments in the Executive Branch to ensuring that regulations do more good than harm -- such as bureaucratic turf battles among the agencies, failure to utilize both internal and external expertise, bias, the mismatch between the vast volume of regulation and OIRA's shrinking resources, the large volume of "stealth regulation" not submitted for OIRA review, lack of support for OIRA by varying administrations or leaders, and lack of judicial review for benefit-cost balancing – as well as the political impediments).

<sup>&</sup>lt;sup>6</sup> When OIRA was created in fiscal year 1981, it had a full-time equivalent (FTE) ceiling of about 97 staff; by fiscal year (FY) 2016, OIRA had about 47 staff. <u>See</u> Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, "Regulators' Budget from Eisenhower to Obama: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2017" (May 2016), at p. 20 (Table A-3). In contrast, the agency staff dedicated to writing, administering and enforcing regulations rose from 146,000 in FY1980 to over 278,00 in FY2016. As OIRA's budget was reduced from about \$14 million in 1981 to \$8 million in FY2016 in constant 2009 dollars, the agencies' budgets increased from about \$16.4 billion in FY1980 to over \$61 billion in FY2016 in constant 2009 dollars. At the same time, OIRA's statutory responsibilities have grown through a wide variety of requirements, including: the Small Business Regulatory Enforcement Fairness Act, the E-Government Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Information Quality Act, the Regulatory Right-to-Know Act, the Small Business Paperwork Relief Act, and a variety of appropriations riders. *See* Comment Letter on Federal Regulatory Review

the greatest yet most readily addressable impediments to the cost-benefit state is that regulatory agencies such as EPA too often have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing. In other words, agencies sometimes have interpreted their regulatory statutes in ways that are inconsistent with the presidential orders and the requirement to regulate only if the benefits justify the costs, sometimes relying on selected pieces of legislative history in ways that limit their interpretations of the statutory text.

Most statutes neither explicitly *mandate* nor *prohibit* benefit-cost balancing. The challenge has been what agencies such as EPA should do when implementing the large majority of regulatory statutes that are *silent or ambiguous* on cost-benefit balancing.

B. Supreme Court precedent makes clear that EPA has broad discretion to balance benefits and costs in implementing its regulatory statutes, and failing to do so could be subject to an arbitrariness challenge.

Most regulatory provisions in environmental statutes neither explicitly require nor prohibit benefit-cost analysis, but rather are silent or ambiguous to varying degrees. Recent case law, particularly from the Supreme Court, has made clear that EPA has broad discretion to interpret its statutes to allow benefit-cost balancing, unless prohibited by statute. See Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009) ("it is eminently reasonable to conclude that [the statutory provision's] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree.") Indeed, the Supreme Court has further clarified that, if EPA fails to consider cost in determining whether to regulate, it is vulnerable to an arbitrariness challenge. See Michigan v. EPA (2015), 135 S. Ct. 2699 (2015) (EPA was arbitrary and capricious for failing to consider cost in determining that regulation was "appropriate and necessary"). In Michigan, all nine justices agree that, unless the statute states otherwise, EPA must consider cost at some stage of the regulatory process.

In light of *Riverkeeper* and *Michigan*, EPA's statutory provisions are subject to reexamination and potential reinterpretation to more fully accommodate benefit-cost balancing. This would include statutes that: (1) are *silent or ambiguous* on the consideration of costs," (2) *authorize consideration of costs* and/or contain one or more broad omnibus factors, such as anything the Administrator considers "reasonable," "appropriate," "necessary," "feasible," etc., but do not explicitly require

https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/

from Paul R. Noe, American Forest & Paper Association, to OMB's Office of Information and Regulatory Affairs (March 16, 2009).

<sup>&</sup>lt;sup>7</sup> Statement of Paul R. Noe, Vice President, Public Policy, American Forest & Paper Association, American Wood Council, before the House Committee on Oversight and Government Reform, "Shining Light on the Federal Regulatory Process" (March 14, 2018); see also, John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016).

benefit-cost balancing, and (3) **authorize benefit-cost balancing** but are ambiguous on the extent or rigor of the benefit-cost balancing that may be done.

# III. EPA should adopt an implementing regulation to ensure its regulatory statutes are implemented in a way that enhances societal well-being.

To ensure consistency, transparency and substantive excellence in how it implements its regulatory statutes, EPA should develop binding requirements to enhance societal well-being. EPA can do so by promulgating an implementing regulation through a legislative rulemaking process with public notice and comment.

In this implementing regulation, EPA first should include a general provision requiring its regulatory statutes to be implemented under a "benefits justify costs" standard to ensure regulations do more good than harm. Second, this general provision should be supplemented by specific provisions as necessary to address specific statutory provisions that may not fully accommodate the general provision.

EPA clearly has the authority to issue a regulation specifying how the Agency will address costs and benefits in the development and promulgation of regulations under its various statutory authorities. Some statutes contain provisions explicitly authorizing regulations necessary to carrying out EPA's functions under the statute, such as Clean Air Act § 301(a)(1) and Clean Water Act § 501(a). But even in the absence of such specific provisions, the Agency has inherent authority under principles of administrative law. See, e.g., Citizens to Save Spencer Cty. v. EPA, 600 F.2d 844, 873-74 (D.C. Cir. 1979) (upholding EPA regulations providing for a transition between new and modified sources subject to PSD review under the original PSD program and those covered under CAA section 165 as provided in the Clean Air Act Amendments of 1977). As the Supreme Court explained in Morton v. Ruiz, 415 U.S. 199, 231 (1974): "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Although this does not mean that an agency can, by regulation, "modify unambiguous requirements imposed by a federal statute," Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2446 (2014), in this case, as explained in these comments, the relevant statutory mandates virtually all lack an unambiguous requirement for EPA to promulgate a rule whose societal costs exceed its societal benefits.

AF&PA and AWC encourage EPA to promulgate a single regulation establishing consistent policies, procedures, and considerations for addressing costs and benefits of EPA rules. The same factors logically can and should be applied across statutes, and any differences needed to reflect differences in statutory authority could be addressed in subsections of a single regulation. This is the approach EPA took, for example, when it adopted the Consolidated Permit Regulations, 45 Fed. Reg. 33,287 (May 19, 1980). There, EPA recognized that permitting under five programs involving four statutes

(CAA, CWA, RCRA, and SDWA) would benefit from clear and consistent procedural rules, based on the same administrative record. See NRDC v EPA, 673 F.2d 392, 395-96, 399 (D.C. Cir. 1982). EPA took a similar approach to procedures for assessing administrative penalties and revoking or suspending permits under 10 statutes it implements, 40 C.F.R. pt. 22. There, as in the Consolidated Permit Regulations, EPA recognized the efficiency and clarity resulting from setting forth general rules applicable to such enforcement proceedings, with any differences required by individual statutes set out in supplemental rules. See 40 C.F.R. § 22.1(b); 45 Fed. Reg. 24,360 (April 9, 1980). For similar reasons, EPA subsequently decided to consolidate the procedural rules for penalties where an adjudicatory hearing is required under the Administrative Procedure Act with those where penalty proceedings are not subject to the APA. See 63 Fed. Reg. 9464-65 (Feb. 25, 1998). EPA took the same approach as well in issuing a single regulation governing judicial review under EPA-administered statutes, 40 C.F.R. pt. 23. EPA also saw the merit in a single set of requirements for providing for public participation in the development of policies and issuance of permits under the CWA, RCRA, and the SDWA, 40 C.F.R. pt. 25.

These same considerations support EPA setting out in a single regulation how it will address costs and benefits when issuing substantive rules. Issuing a single regulation would also help improve the likelihood that questions concerning those procedures would be resolved in a single consolidated proceeding for judicial review, rather than in multiple, potentially conflicting opinions. See NRDC v EPA, 673 F.2d at 399; see also NRDC v. EPA, 673 F.2d 400 (D.C. Cir. 1982).

# IV. EPA should enhance the rigor with which it analyzes and quantifies the benefits and costs of its regulations.

While EPA's notice does not reopen the robust existing guidance that it follows in conducting regulatory impact analyses, such as OMB's Circular A-4,8 it does request comment on specific analytic approaches on quantifying costs and benefits.9

Consistent with E.O. 12866 and OMB Circular A-4, before EPA proceeds to consider the costs and benefits of various approaches, it should identify a compelling need for regulation, such as the material failure of private markets. In consultation with OMB, EPA also should consider taking steps that would increase the consistency, rigor and transparency of its regulatory impact analyses. For example, EPA should consider adopting uniform definitions of "cost," "benefit," and "weight of the scientific evidence." Consistent with Circular A-4, the concept of cost should encompass opportunity costs. Regarding ancillary benefits (i.e., co-benefits), where they are particularly significant, EPA should carefully consider whether alternative regulatory approaches would be

<sup>8 83</sup> FR at 27,525.

<sup>9 83</sup> FR 27,524.

more efficient at providing those benefits. EPA also should be transparent about any significant scientific uncertainty and avoid double-counting the same benefits (including ancillary benefits) in multiple rules. Moreover, in estimating the risk reduction benefits of its regulations, EPA should adopt a plausible probabilistic risk assessment approach using the best available information, not unrealistic deterministic approaches that involve compounded conservatism that does not result in plausible risk estimates.

In its regulatory impact analyses, EPA also should transparently consider plausible alternatives; use a reasonable baseline; estimate marginal benefits and costs; present objective and unbiased "expected values," as well as ranges of costs and benefits, plus sensitivity analysis that shows the effects of key assumptions, data and models; use transparent and objective inputs and present alternative models and assumptions; be transparent and consistent in how benefits and costs are distributed; and present costs and benefits in a symmetrical way (e.g. baseline, time frame, discount rate). <sup>10</sup> Finally, EPA should require both in its regulatory impact analyses and in the preambles to its proposed and final regulations a standardized summary of the results of its benefit-cost analysis, including a range and expected estimate of the costs and benefits, the key assumptions and uncertainties, the sensitivity of the results to key assumptions, data and models, and the key limitations of the analysis.

#### V. Conclusion

EPA's notice opens for discussion a promising opportunity to increase the consistency, transparency, and substantive excellence of how it interprets and implements its regulatory statutes, consistent with the longstanding presidential orders, to ensure that its regulations do more good than harm. EPA should take an historic step to enhance societal well-being by promulgating implementing regulations to guide the reexamination of its statutory interpretations in light of *Riverkeeper* and *Michigan*, and -- unless prohibited by statute -- implement its regulatory statutes through benefit-cost balancing. As the Supreme Court has concluded, it is "eminently reasonable" to ensure that regulations do more good than harm.<sup>11</sup>

<sup>&</sup>lt;sup>10</sup> Susan E. Dudley, The George Washington University Regulatory Studies Center, "Public Interest Comment on the Environmental Protection Agency's Advanced Notice of Proposed Rulemaking, 'Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process'" (July 16, 2018) (reviewing "Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker").

<sup>&</sup>lt;sup>11</sup> Riverkeeper, 129 S. Ct. at 1508.

Thank you for your consideration of these comments. If you have any questions, please contact me at <u>paul\_noe@afandpa.org</u> or (202) 463-2700.

Sincerely,

Paul R. Noe

Vice President for Public Policy

American Forest & Paper Association

American Wood Council



A Publication of the Penn Program on Regulation

Opinion | Environment | Aug 28, 2018

# **Crossing the Regulatory Divide to Enhance Societal Well-Being**

## Paul R. Noe



Requiring EPA cost-benefit analysis could ensure that regulations do more good than harm.

The <u>U.S. Environmental Protection Agency</u> (EPA) recently has taken a historic step to advance the "cost-benefit state," the <u>paradigm</u> in which "government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation."

EPA issued an <u>advance notice of proposed rulemaking</u> soliciting public comment on whether and how EPA should create rules for weighing costs and benefits when implementing statutes. EPA also <u>requested</u> comment on specific analytic approaches to quantifying costs and benefits.

This advance notice raises many interesting issues—but most importantly, it could lead to fundamental and beneficial change that is long overdue.

Although every President since Ronald Reagan has <u>required</u> by executive order that executive agencies perform cost-benefit analysis for major rules and only regulate if the benefits justify the costs, the agencies all too often construe statutes in a way that precludes full compliance with these directives. In a garden-variety case, an agency interprets a legislative provision that is silent or ambiguous on the role of cost-benefit analysis—perhaps with analysis of some legislative

history to support the agency's preferred interpretation of the text—to establish a decision standard inconsistent or in conflict with the presidential order requiring cost-benefit balancing.

Yet the actual statutory text does not prohibit cost-benefit balancing. And, of course, none of the legislative history satisfied the constitutional requirements for becoming law, and thus neither requires nor authorizes violating the presidential directive. This dubious approach to statutory interpretation remains one of the greatest yet most readily addressable <u>impediments</u> to the cost-benefit state.

The scope of EPA's discretion to balance benefits and costs under ambiguous statutes is critical because most environmental statutes, like other regulatory statutes, are silent or ambiguous on cost-benefit analysis. Moreover, alternatives to cost-benefit analysis, such as feasibility analysis, are inferior tools for enhancing societal well-being. Feasibility analysis involves regulating any significant risk to the extent technologically or economically feasible. Compelling evidence shows that feasibility analysis lacks a normative justification, can just as easily lead to underregulation as to over-regulation, and should have no place in government regulation. This evidence highlights the need to reduce impediments to the cost-benefit state.

When I served at the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget, I had the opportunity to work on new regulations under a section of the Clean Water Act. The section is silent on cost-benefit balancing and instructs that the standard for cooling water intake structures should "reflect the best technology available for minimizing adverse environmental impact." With the enthusiastic encouragement of OIRA, EPA adopted a cost-benefit standard—but the standard was initially overturned 3-0 by the U.S. Court of Appeals for the Second Circuit.

Fortunately, in <u>Entergy Corp. v. Riverkeeper</u>, Justices Antonin Scalia and Stephen Breyer joined in a 6-3 reversal that made quite clear EPA's broad discretion to interpret statutes that are silent or ambiguous on benefit-cost balancing as permitting, not forbidding, such rational <u>regulation</u>. The Court noted that the "best" technology could be the most efficient and <u>described</u> as "eminently reasonable" the conclusion that the statutory "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."

Although *Entergy* did not mandate that agencies use cost-benefit analysis to implement ambiguous statutes, it raised the ante for those that evade it. Since the *Entergy* Court <u>clarified</u> the broad discretion of agencies to employ cost-benefit balancing, under basic principles of administrative law, if an agency eschews this balancing, the agency must <u>provide</u> a "reasoned explanation" for the decision to regulate in a manner that could do more harm than good, or provide a reasoned explanation for the agency's indifference to that outcome. Absent a reasoned explanation, the agency's rule could be <u>overturned</u> as arbitrary and capricious.

The <u>U.S. Supreme Court</u> later made the arbitrary and capricious standard quite clear in <u>Michigan v. EPA</u>, where a 5-4 majority held that EPA unreasonably refused to consider cost in initially deeming a regulation "appropriate and necessary." The Court also unanimously <u>supported</u> the

principle that EPA must consider cost at some stage in the regulatory process, unless prohibited by statute.

Thus, after *Entergy* and *Michigan*, it is clear that EPA can reinterpret its regulatory statutes and require full cost-benefit balancing, not just feasibility analysis, to set regulatory standards—unless prohibited by law.

Although the requirement to balance benefits and costs has stood for nearly four decades, it has been an executive branch monopoly. The general requirement to conduct the cost-benefit analysis and to do more good than harm has only been <u>requested</u> by presidential orders and only overseen by OIRA. Having worked at OIRA, I strongly support the system for presidential review of rules and its essential role in improving their quality, efficiency, and accountability.

I also believe, however, that the status quo is insufficient for many reasons. These reasons <u>include</u> the institutional limitations of the agencies and OIRA—such as bureaucratic turf battles, failure to use both internal and external expertise, bias, and the mismatch between the vast volume of regulation and OIRA's shrinking resources. Political dysfunctions—such as inconsistent support for OIRA by varying administrations, interest group rent-seeking, and presidential electoral politics—also <u>limit</u> the effectiveness of the status quo. As only one branch of government owns the process—and the cost-benefit directive can be treated more as a request than a binding requirement—regulatory reviews may simply conclude with self-praise.

Although the courts have been evolving toward the cost-benefit state in Supreme Court cases such as *Entergy* and *Michigan* as well as in lower court decisions such as *Business Roundtable v. SEC* and *Cooling Water Intake Structure Coalition v. EPA*, the progress has been slow and tentative. Moreover, the cost-benefit executive orders have expressly precluded judicial review. If EPA issues its own regulations requiring cost-benefit balancing for implementing its regulatory statutes, the courts could <u>ensure</u> compliance with those provisions. This would further EPA's goals of increasing the consistency and transparency of how it interprets and implements its statutes.

Reasonable minds can agree that the goal of regulation is to enhance, not undermine, societal well-being. Doing more good than harm is not only common sense and the essence of rational decision making—it also could bridge the partisan divide.



<u>Paul R. Noe</u> is vice president for public policy at the American Forest & Paper Association, and he served as counselor to the Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget.

The views expressed in this essay are Mr. Noe's own and do not represent the views of the American Forest & Paper Association or its members.

This essay is part of a series, entitled Consistency and Transparency in Environmental Cost-Benefit Analysis.

#### Message

From: Noe, Paul [Paul\_Noe@afandpa.org]

**Sent**: 3/20/2018 1:59:22 PM

To: Bolen, Brittany [bolen.brittany@epa.gov]
Subject: Testimony on Regulatory Transparency

Attachments: Testimony Regulatory Transparency NOE House COGR 031418.pdf

Flag: Follow up

Brittany: FYI, attached is my testimony from last week's hearing on regulatory transparency before the House Committee on Oversight and Government Reform. See Section II, p. 11.

Paul





# Statement of Paul R. Noe Vice President, Public Policy American Forest & Paper Association American Wood Council

#### **Before**

House Committee on Oversight and Government Reform "Shining Light on the Federal Regulatory Process" March 14, 2018

Chairman Gowdy, Ranking Member Cummings, and Members of the Committee, my name is Paul Noe, and I am the Vice President for Public Policy for the American Forest & Paper Association and the American Wood Council. Thank you for the honor to testify before you on regulatory transparency. This is a fundamentally important issue that goes to the heart of our governmental system -- due process, fundamental fairness and accountability, and we applaud the Committee for doing the hard work of addressing it.

I have been involved in regulatory policy in Washington for over 32 years, including the privilege of having served as counsel to Chairmen Fred Thompson, Ted Stevens and Bill Roth on the Senate Governmental Affairs Committee, and as a drafter of agency good guidance practices when I served as Counselor to Administrator John Graham at the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB). My experience working for the heavily regulated forest products industry for the last nine years further reinforces my appreciation of the importance of transparency and accountability in our regulatory process. Today, I would like to focus on a handful of specific agency problems and offer some solutions regarding the need for: (1) better compliance with good guidance practices; (2) stronger compliance with presidential orders on benefit-cost analysis, such as Executive Order 12866, by interpreting regulatory statutes to allow for balancing the benefits and costs of regulations to maximize societal well-being; (3) greater transparency about the key information supporting regulatory decisions; and (4) better compliance with the Congressional Review Act.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are

committed to continuous improvement through the industry's sustainability initiative - <u>Better Practices</u>, <u>Better Planet 2020</u>. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products. AF&PA and AWC work together to advance policies of issues of mutual concern, including regulatory reform.

#### I. The Need for Better Good Guidance Practices.

The forest products industry has seen both sides of the coin on agency guidance. In some instances, questions of implementation can be appropriately, effectively and efficiently resolved through guidance. In others, the use of agency guidance may lack appropriate transparency and due process, even to the point of inappropriately and unlawfully substituting for regulation. Accordingly, AF&PA and AWC support legislative and administrative efforts that ensure transparency, due process and effective management for significant agency guidance.

#### A. Background<sup>1</sup>

President Reagan's Executive Order 12291, which firmly established OMB review of rules, was quite broad in scope and applied to virtually all "rules" — including both regulations (legally binding legislative rules) and agency guidance (non-binding interpretive rules and policy statements). When President Clinton replaced the Reagan Order in 1993 with Executive Order 12866, it honed in on "significant" regulatory actions. Given the vastness of federal regulatory activity, and the limited resources of OIRA, it was eminently sensible to try to sort the significant agency activity from the insignificant. The problem is that while the Clinton Order applied to significant regulations, it neglected guidance documents — covering only rules that "the agency intends to have the force and effect of law." But there is no doubt that guidance documents can be quite significant. In fact, agencies issue over 3400 regulations

2

<sup>&</sup>lt;sup>1</sup> See John D. Graham and Paul R. Noe, "Due Process and Management for Guidance Documents: Good Governance Long Overdue," 1 Yale J. on Reg. 103 (2008).

annually, but the volume of guidance documents is orders of magnitude larger,<sup>2</sup> and nobody actually knows how many there are.

Starting in 2002, as part of its obligation to provide recommendations for reform under the "Regulatory Right-to-Know Act," OIRA requested public comment on problematic agency guidance and regulations, and received public nominations of 49 problematic guidance documents in need of reform. OIRA received further public comments on problematic guidance in response to its request for public comment on its draft Report to Congress on the Costs and Benefits of Federal Regulation in 2004 and 2005 and on the proposed Bulletin. The public response was striking – hundreds of comments from a wide array of groups raised concerns – small businesses, farmers, state and local governments, homebuilders, colleges and universities, large businesses, hospitals, trade associations, funeral directors, public interest groups, think tanks, bird watchers, and others. A cursory review of the Preamble to the OMB Bulletin, the comments that OMB received and posted on its website, and the scholarly literature provide many examples.

Although guidance documents may not properly carry the force of law, they are a key component of regulatory programs. As the scope and complexity of regulatory programs has grown, agencies increasingly have relied on guidance documents to provide direction to their staff and to the public. That generally is to the good, and I want to clearly acknowledge that agency guidance often is both very important and very helpful to the regulated community and others. As OMB stated:

<sup>&</sup>lt;sup>2</sup> See, e.g., Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1469 (1992) (noting that the formally adopted rules of the Federal Aviation Administration are two inches thick, but the corresponding guidance materials, over forty feet; Part 50 of the Nuclear Regulatory Commission's regulations on nuclear plant safety, in loose-leaf edition, is 3/16 of an inch, but the supplemental technical guidance is 9 3/4 inches; and the formally adopted regulations of the IRS occupy one foot of shelf space, but Revenue rulings and similar publications, about twenty feet); see also H. Comm. on Gov't. Reform, "Non-Binding Legal Effect of Agency Guidance Documents," H.R. Rep. No. 106-1009 (2000) (noting that between March 1996 through 1999, NHTSA had issued 1225 guidance documents, EPA 2653, and OSHA 1641).

<sup>&</sup>lt;sup>3</sup> OMB, Key to Public Comments, <a href="https://www.whitehouse.gov/omb/inforeg">https://www.whitehouse.gov/omb/inforeg</a> key comments (last visited June 24, 2016); see also, OMB, Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities, at pp. 75-85 <a href="https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002">https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002</a> report to congress.pdf (last visited June 24, 2016).

<sup>&</sup>lt;sup>4</sup> OMB, Peer Review and Public Comments on the 2005 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, <a href="http://www.whitehouse.gov/omb/inforeg/2005">http://www.whitehouse.gov/omb/inforeg/2005</a> cb/toc.html (last visited June 24, 2016); OMB, Public Comments on 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, <a href="https://www.whitehouse.gov/omb/inforeg">https://www.whitehouse.gov/omb/inforeg</a> 2004 cb list 2004cb/ (last visited June 24, 2016).

<sup>&</sup>lt;sup>5</sup> OMB, Comments on Proposed Bulletin on Good Guidance Practices, https://www.whitehouse.gov/omb/regpol\_good\_guid\_c-index/ (last visited June 24, 2016).

<sup>&</sup>lt;sup>6</sup> See, e.g., Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals and the Like –Should Federal Agencies Use Them to Bind the Public?" 41 Duke L.J. 1311 (1992); Robert A. Anthony, "Interpretive' Rules, 'Legislative' Rules and 'Spurious' Rules: Lifting the Smog," 8 Admin. L.J. (Spring 1994).

"Agencies may properly provide guidance to interpret existing law through an interpretative rule, or to clarify how they will treat or enforce a governing legal norm through a policy statement. . . . Guidance documents, properly used, can channel the discretion of agency employees, increase efficiency by simplifying and expediting agency enforcement efforts, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties."

Unfortunately, many concerns have been raised that agency guidance practices should be better managed, more consistent, transparent and accountable. These concerns are reinforced by the GAO report that Congress requested on implementation of the OMB Bulletin by four cabinet departments.<sup>8</sup> Moreover, there is growing concern that, in some cases, guidance documents essentially are being used in lieu of regulations -- without observing the procedural safeguards for regulations. As the D.C. Circuit put it:

"The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."

The concern about the need for better management, transparency and due process for the development and use of guidance documents inspired OIRA to develop the OMB Bulletin for Agency Good Guidance provisions, supplemented by a provision in Executive Order 13422 for OMB review of agency guidance. In pertinent part, E.O. 13422 provided:

#### "Significant Guidance Documents

Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notice of any significant guidance documents. . . . Upon the request of the Administrator, for each matter identified as, or determined by the

<sup>&</sup>lt;sup>7</sup> OMB, Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities, at p. 72

https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002\_report\_to\_congress.pdf

<sup>&</sup>lt;sup>8</sup> U.S. Government Accountability Office, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015) (reviewing implementation of OMB Bulletin for Agency Good Guidance Practices by the departments of Health and Human Services, Labor, Education and Agriculture and finding significant deficiencies).

<sup>&</sup>lt;sup>9</sup> <u>Appalachian Power Co. v. EPA</u>, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (striking down emissions monitoring guidance as requiring notice and comment through legislative rulemaking procedures).

Administrator to be, a significant guidance document, the issuing agency shall provide to OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document."

Together, Executive Order 13422 and the OMB Bulletin establish the first government-wide "rules of the road" to manage the development and use of guidance documents. The E.O. 13422 gave clear authority to OMB to review significant agency guidance documents, a streamlined version of how OMB reviews significant agency regulations. The agencies, in turn, were required to give OMB advance notice of their upcoming significant guidance documents. OMB would be responsible for ensuring that other interested agencies in the federal family received notice, and occasionally, an opportunity to provide input into the most important guidance documents.

The OMB Bulletin on Good Guidance Practices fit hand in glove with E.O. 13422. First, agencies must implement written procedures for the approval of significant guidance documents by appropriate senior officials. Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence. Second, significant guidance documents must have standard elements, such as information identifying the document as guidance, the issuing office, the activity and persons to whom it applies, the date of issuance, title and docket number.

Most notably, agencies are directed to avoid inappropriate mandatory language. This provision was intended to help curb the problem of "regulation by guidance document" criticized in the <u>Appalachian Power</u> decision and others. It also will obviate wasteful litigation and increase fairness and accountability in the exercise of regulatory power.

The Bulletin also establishes public access and feedback procedures. For example, agencies are required to maintain on their Web sites a current list of their significant guidance documents, and to provide a means for the public to electronically submit comments on significant guidance documents, or to request that they be created, reconsidered or modified. Finally, the Bulletin establishes pre-adoption notice and comment requirements for guidance documents that rise to the level of being "economically" significant.

When President Obama took office, he retained the OMB Bulletin, but he rescinded E.O. 13422. To substitute for the good guidance provisions of E.O. 13422, the OMB Director issued a memo to restore the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007. The memo stated: "During this period, OIRA reviewed all significant proposed or final agency actions, including significant policy and guidance documents. Such agency actions and documents remain subject to OIRA's review under Executive Order 12866."

My understanding is that, under that approach, OIRA reviewed little guidance, and when it did, the practice was ad hoc and disorganized. This comes as no surprise since there

was no written authority for the practice -- and no procedures governing it. The problem is that:

- OIRA desk officers had to already know the guidance existed, and
- They had to get permission to call in a guidance.

The shortcomings of this approach are obvious. It is impossible to review what you don't know exists. The review process is broken when the first time OIRA desk officers know about an important guidance document is when they read about it in the Washington Post. How many significant guidance documents do you think an OIRA desk officer might not know about before it was issued? Plenty, I can assure you. And would it be clearly unreasonable for agencies to feel that OMB had no business looking at their draft guidance without any explicit authorization? It was no accident that the provision for OIRA review of guidance was elevated into an Executive Order rather than simply being added to the Bulletin.

Ignoring guidance inadvertently can undermine OMB's authority to review regulations, similar to how it undermines court review, as the D.C. Circuit explained in <u>Appalachian Power</u>. The agency could issue broad, open-ended legislative rules that pass through interagency review (and court review, and for that matter, Congressional review). Then the agency could follow with guidance "expanding the commands in the regulations" to a degree that would have raised concerns if those details had appeared in the regulations. In fact, one might wonder how OMB's abstention from managing and coordinating significant guidance documents may have contributed to the growth in "spurious rules" cases in the courts, which increasingly have criticized agencies for issuing binding rules without observing the public notice and comment procedures that Congress required in the Administrative Procedure Act. 10

### B. The Precedent for Good Guidance Practices

Even before the OMB public comment process, there was a strong foundation for the good guidance practices in E.O. 13422 and the OMB Bulletin that was rooted in the recommendations of leading authorities that stood for decades. This foundation

<sup>10</sup> The growth in so-called "spurious rule" court cases in the 1990s may not be a coincidence. See, e.g., <u>Gen. Elec. Co. v. EPA</u>, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as a spurious rule requiring notice and comment); <u>Appalachian Power Co. v. EPA</u>, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as spurious rule requiring notice and comment); <u>U.S. Chamber of Commerce v. Dep't of Labor</u>, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as a spurious rule requiring notice and comment). *See also*, OMB, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3435 (Jan. 25,

2007); OMB, Key to Public Comments, https://www.whitehouse.gov/omb/regpol\_good\_guid\_c-index/ (last visited June 24, 2016).

includes the work of many authorities – including the Executive Branch, <sup>11</sup> Congress, <sup>12</sup> the courts, <sup>13</sup> the American Bar Association, <sup>14</sup> and legal scholars. <sup>15</sup>

First, the Administrative Conference of the United States (ACUS)<sup>16</sup> issued recommendations for the development and use of agency guidance documents. As far back as the mid-1970s, for example, ACUS recognized the importance of ensuring a notice and comment process for the most significant guidance documents. ACUS Recommendation 76-5 states:

"Before an agency issues, amends or repeals an interpretive rule of general applicability or statement of general policy which is likely to have a substantial impact on the public, the agency normally should utilize the procedures set forth

<sup>&</sup>lt;sup>11</sup> Recommendations of the Administrative Conference of the United States, *Agency Policy Statements*, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), available at http://www.law.fsu.edu/library/admin/acus/305922.html (stating that agencies should not issue statements of general applicability intended to be binding without using legislative rulemaking procedures and that agencies should afford the public a fair opportunity to challenge the legality or wisdom of policy statements and to suggest alternative choices); Recommendations of the Administrative Conference of the United States, Interpretive Rules of General Applicability and Statements of General Policy, Rec. 76-5, 1 C.F.R. § 305.76 (1992), available at http://www.law.fsu.edu/library/admin/acus/305765.html (stating that agencies should utilize APA notice and comment procedures for interpretive rules of general applicability or statements of general policy likely to have a substantial impact on the public ); The Food and Drug Administration's Development, Issuance, and Use of Guidance Documents, 62 Fed. Reg. 8961 (Feb 27, 1997) (notice) (establishing FDA's original good guidance practices); OMB, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15,014, 15,034-35 (Mar. 28, 2002) (detailing concerns over soliciting public comments on problematic agency guidance practices and specific examples of guidance documents in need of reform). <sup>12</sup> See, e.g., U.S. Government Accountability Office, Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices, GAO-15-368 (April 2015); Congressional Review Act of 1996, 5 U.S.C. §§ 801-808 (2000) (providing fast-track procedures for Congressional resolutions of disapproval of rules and incorporating the APA definition of "rule" to cover guidance documents); Food and Drug Administration Modernization Act of 1997, 21 U.S.C. § 371(h) (2000) (establishing FDA good guidance practices as law); Congressional Accountability for Regulatory Information Act, H.R. 3521, 106th Cong. § 4 (2000) (proposing to require agencies to notify the public of the non-binding effect of guidance documents), H. Comm. on Government Reform, Non-Binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009 (2000) (criticizing "backdoor" regulation); Food and Drug Administration Modernization and Accountability Act of 1997, S. Rep. No. 105-43, at 26 (1997) (raising concerns about the lack of transparency and consistency in the use of guidance documents).

<sup>&</sup>lt;sup>13</sup> See, e.g., supra note 10.

<sup>&</sup>lt;sup>14</sup> ABA, Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting 57 (1993) (recommending notice and comment for guidance documents likely to have a significant impact on the public); ABA, Recommendation on Federal Agency Web Pages 1 (2001), <a href="http://www.abanet.org/adminlaw/federa02.pdf">http://www.abanet.org/adminlaw/federa02.pdf</a> (recommending that agencies post on their Websites, inter alia, all important policies and interpretations).

<sup>&</sup>lt;sup>15</sup> See, e.g., Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 Admin. L.J. I (1994); Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals and the Like-Should Federal Agencies Use Them to Bind the Public? 41 Duke L.J. 1311 (1992); see also, OMB, Final Bulletin for Agency Good Guidance Practices, at pp. 2-3 & n. 2, 6.

<sup>&</sup>lt;sup>16</sup> ACUS is a federal advisory agency charged with providing recommendations on administrative procedure issues. ACUS has made hundreds of recommendations on administrative procedure issues, and most were adopted by agencies or by Congress. *See* Florida State University College of Law, *ABA Administrative Procedure Database*, <a href="https://www.law.fsu.edu/library/admin/acus/acustoc.html">www.law.fsu.edu/library/admin/acus/acustoc.html</a> (last visited June 24, 2016).

in the Administrative Procedure Act subsections 553(b) and (c) .... Where there has been no prepromulgation notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy... should include ... an invitation to interested persons to submit written comments "<sup>17</sup>

#### ACUS Recommendation 92-2 later added

"Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures.... Policy statements of general applicability should make clear that they are not binding.... Agencies that issue policy statements should examine, and where necessary, change their ... procedures ... to allow as an additional subject requests for modification or reconsideration of such statements." 18

In 1993, the American Bar Association (ABA) reaffirmed the ACUS recommendations on the use of informal notice and comment procedure for significant guidance documents. <sup>19</sup> In 2001, the ABA further recommended that agencies "explore means to maximize the availability and searchability of existing law and policy on their websites" and include "their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters which members of the public are likely to request."<sup>20</sup>

Moreover, Congress produced what became a model for OMB's Good Guidance Practices. <sup>21</sup> In the Federal Food and Drug Administration Modernization Act of 1997, Congress directed the FDA to issue regulations establishing good guidance practices. <sup>22</sup> Congress was particularly concerned about public knowledge of, and access to, FDA guidance documents; the lack of a systematic process for adopting guidance

<sup>&</sup>lt;sup>17</sup> Recommendations of the Administrative Conference of the United States, *Interpretive Rules of General Applicability and Statements of General Policy*, Rec. 76-5, 1 C.F.R. § 305.76-5 (1992), available at http://www.law.fsu.edu/library/admin/acus/305765.html.

<sup>&</sup>lt;sup>18</sup> ACUS, Agency Policy Statements, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), available at http://www.law.fsu.edu/library/admin/acus/305922.html

<sup>&</sup>lt;sup>19</sup> ABA, Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting 57 (1993) ("[T]he American Bar Association recommends that: Before an agency adopts a nonlegislative rule that is likely to have a significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoption comment and give notice of this opportunity.").

<sup>&</sup>lt;sup>20</sup> ABA, Recommendation on Federal Agency Web Pages 1 (2001), http://www.abanet.org/adminlaw/federa02.pdf.

<sup>&</sup>lt;sup>21</sup> As OMB stated in its Preamble (pp. 4-5), FDAMA and FDA's implementing regulations, as well as the recommendations of the former Administrative Conference, informed the development of the Bulletin.

<sup>&</sup>lt;sup>22</sup> Food and Drug Administration Modernization Act of 1997, 21 U.S.C. § 371(h) (establishing FDA good guidance practices as law).

documents and for allowing public input; and inconsistency in the use of guidance documents.<sup>23</sup> Those same concerns apply to other agencies as well.

### C. The Need for Action<sup>24</sup>

The case for Congressional action is strong. The OMB Bulletin has been in effect since early 2007 in both Republican and Democratic administrations. Over eleven years is more than enough time for the agencies to have fully complied with basic good guidance practices. Yet clearly they have not, as shown by Congressional oversight, including hearings by Senator Lankford<sup>25</sup> and others. Moreover, in 2015, the U.S. Government Accountability Office issued a report<sup>26</sup> on how four major departments – the Departments of Agriculture, Education, Health and Human Services, and Labor and their 25 component agencies – have complied with the OMB Bulletin. The report showed those departments and their component agencies generally had a long track record of failing to comply with basic good government requirements of the Bulletin, including the following:

- All components claimed they did not issue any economically significant guidance (and thus were not required to conduct pre-adoption notice and comment);
- Only six of 25 components had written procedures to ensure consistent application of guidance (p.25);
- HHS had no written procedures for approval of significant guidance, and DOL's procedures were not available to its staff;
- Nearly half of the components did not regularly evaluate whether issued guidance remained effective;
- HHS did not post significant guidance was not posted on a departmental website as required by OMB;
- Public online access to guidance was difficult to find and they failed to use of metrics to improve dissemination.

GAO concluded with the following recommendations:

 HHS and DOL should ensure consistent application of OMB requirements for significant guidance; and

<sup>&</sup>lt;sup>23</sup> Food and Drug Administration Modernization and Accountability Act of 1997, S. Rep. 10543, at 26 (1997).

<sup>&</sup>lt;sup>24</sup> See Paul Noe, "Shining the Light on Regulatory Dark Matter," AF&PA Blog (Feb. 6, 2018), http://www.afandpa.org/media/blog/bloga/2018/02/06/shining-the-light-on-regulatory-dark-matter-due-process-and-management-for-agency-guidance-documents

<sup>&</sup>lt;sup>25</sup> See, e.g., U.S. Senate Committee on Homeland Security & Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, *Hearing on Examining the Use of Agency Regulatory Guidance, Part II (June 30, 2016)*, 114<sup>th</sup> Cong. 2nd Sess., Washington DC.

<sup>&</sup>lt;sup>26</sup> U.S. Government Accountability Office, <u>Regulatory Guidance Processes</u>: <u>Selected Departments Could Strengthen</u> Internal Control and Dissemination Practices, GAO-15-368 (April 2015).

 All four departments should strengthen use of internal controls in guidance production processes and improve online guidance dissemination.

It is evident that more should be done to improve the development and use of agency guidance. For example, Congress could elevate good guidance practices into statute. An excellent first step would be enactment of the "Guidance Out Of Darkness Act," H.R. 4809, sponsored by Congressman Walker. The GOOD Act would require federal agencies to post all of their guidance in a centralized, accessible location on their website. This is a common sense and long overdue requirement of the OMB Bulletin that the agencies have failed to comply with.<sup>27</sup>

The Administration also could do more to promote good guidance practices. In fact, the Department of Justice (DOJ) recently provided leadership by issuing a memorandum in November to prohibit improper guidance documents at DOJ<sup>28</sup> and also by more recently issuing a memorandum to curb improper use of guidance in civil enforcement cases.<sup>29</sup>

Yet, more can and should be done. For example, the Office of Management and Budget could do more to promote good guidance practices on a government-wide basis by updating the Bulletin. First, OMB should have procedures for the agencies to inform it and other agencies about their intentions to use guidance, coordinate with other interested agencies, receive input, and be transparent. Basic procedures are needed for OMB and other agencies to get a "heads up" during the development of agency guidance. Also, the resources should be provided to do the job right. Second, the agencies could follow the recommendations of the Administrative Conference of the United States and the ABA Administrative Law Section to provide streamlined preadoption notice-and-comment for significant guidance documents – not just "economically significant" guidance – or allow public comment after issuance where there is a need for prompt action. My understanding is that FDA does this already and the practice has been generally successful.

<sup>&</sup>lt;sup>27</sup> Congress also might want to investigate whether agencies have complied with the requirement in 5 U.S.C. 552(a)(1)(D) to publish in the Federal Register statements of general policy and interpretations of general applicability.

<sup>&</sup>lt;sup>28</sup> Memorandum from Attorney General Jeff Sessions to all Components, "Prohibition on Improper Guidance Documents" (Nov. 16, 2017), <a href="https://www.justice.gov/opa/press-release/file/1012271/download">https://www.justice.gov/opa/press-release/file/1012271/download</a>

<sup>&</sup>lt;sup>29</sup> Memorandum from Associate Attorney General Rachel Brand to Heads of Litigating Components, "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (Jan. 25, 2018), https://www.justice.gov/file/1028756/download

# II. Curtail the Evasion of Presidential Orders on Benefit-Cost Analysis by Interpreting Regulatory Statutes to Allow for Full Benefit-Cost Balancing.

### A. Background

While efforts to promote the use of benefit-cost analysis<sup>30</sup> have been longstanding, over time a remarkable consensus has emerged. In the Executive Branch, there is a striking similarity among the principles for benefit-cost balancing and centralized review of regulation required by every president for over 37 years, from Ronald Reagan to Donald Trump. The Judicial Branch, and the Supreme Court in particular, has clarified that benefit-cost analysis can have a central role in a host of regulatory programs, and if agencies ignore this invitation, they could jeopardize the very regulations they want to promote. In Congress, there is a renewed interest in requiring benefit-cost analysis by statute that is greater than any time in the past 20 years.

On their face, probably the greatest consensus on the "cost-benefit state"<sup>31</sup> is reflected in the Executive orders governing regulatory analysis and review. Going back to 1981, President Reagan's Executive Order 12291 established general requirements that, "to the extent permitted by law:

- "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society," and
- "[r]egulatory objectives shall be chosen to *maximize the net benefits to society*" (Emphasis added).

Similarly, President Clinton's E.O. 12866, issued in 1993 and still in effect, requires that agencies, to the extent permitted by law:

- "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," and
- "in choosing among alternative regulatory approaches, . . . select those approaches that *maximize net benefits* (including potential economic, environmental, public health and safety, and other advantages; distributive

Benefit-cost analysis (BCA) is "[a] systematic quantitative method of assessing the desirability of government projects or policies when it is important to take a long view of possible side-effects." OMB Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs," Appendix A (1992). BCA involves calculating and comparing the benefits and costs of regulatory options, including an account of foregone alternatives and the status quo, with the goal of identifying the option that would maximize societal welfare. As Justice Breyer explained, "every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009). The term "benefit-cost analysis" can be used interchangeably with "cost-benefit analysis."

31 I adopt the definition of the "cost-benefit state" advanced by President Obama's former OIRA Administrator, Cass Sunstein – "that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation." Cass R. Sunstein, The Cost-Benefit State: The Future of Regulatory Protection, Chicago, IL, American Bar Association, Section of Administrative Law and Regulatory Practice (2002).

effects; and equity) unless a statute requires another regulatory approach" (Emphasis added).

President Obama's E.O. 13563 (2011) reaffirms the Clinton order and reiterates virtually verbatim the two provisions listed above, as well as others. E.O. 13563 also more strongly embraces quantitative benefit-cost balancing than the Clinton order by elevating both provisions to general principles" that the agencies "must" execute and by adding a new principle promoting quantitative benefit-cost analysis and risk assessment:

 "In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

Thus, there has been strong bipartisan consensus that benefit-cost balancing should play a central role in the question of whether and how to regulate. As the Clinton Administration explained in OMB's first Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997):

"[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.

The only way we know how to distinguish between regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits." (p. 10)

While this remarkable political consensus is laudatory, insufficient progress has been made over the last 37 years. There are many reasons why presidential orders directing agencies to implement regulatory statutes through benefit-cost balancing have been far less effective than intended. This includes the severe and chronic under-funding of OIRA (which now has far more responsibilities and less than half the staff it had under President Reagan);<sup>32</sup> institutional limitations of the agencies and OMB; and political

<sup>&</sup>lt;sup>32</sup> When OIRA was created in fiscal year 1981, it had a full-time equivalent (FTE) ceiling of about 97 staff; by fiscal year (FY) 2016, OIRA had about 47 staff. See Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, "Regulators' Budget from Eisenhower to Obama: An Analysis of the U.S. Budget

dysfunctions, including interest group dynamics and Presidential electoral politics.<sup>33</sup> But one of the greatest yet most readily addressable impediments to the cost-benefit state is that the regulatory agencies have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing and to maximize societal well-being, as required by the President.<sup>34</sup>

Why? Agencies have interpreted their regulatory statutes in ways that circumvented the presidential orders and the requirement to maximize net benefits to society, sometimes relying on selected pieces of legislative history to limit their interpretations of the statutory text. Of course, none of that legislative history met the Bicameralism and Presentment requirements for legislation and thus did not require or authorize non-compliance with the presidential benefit-cost orders.

While only a small minority of statutes explicitly *mandate* benefit analysis-cost, <sup>35</sup> and a very small minority *prohibit* it, <sup>36</sup> the challenge has been what agencies should do when implementing the large majority of regulatory statutes that are *silent or ambiguous* on cost-benefit balancing. One problem that may have contributed to agency evasion of the presidential orders is that, in earlier Supreme Court case law from 1981 and 2001, there was some misleading dicta that some claimed established a "presumption" against

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for Fiscal Years 1960 through 2017" (May 2016), at p. 20 (Table A-3). In contrast, the agency staff dedicated to writing, administering and enforcing regulations rose from 146,000 in FY1980 to over 278,00 in FY2016. As OIRA's budget was reduced from about \$14 million in 1981 to \$8 million in FY2016 in constant 2009 dollars, the agencies' budgets increased from about \$16.4 billion in FY1980 to over \$61 billion in FY2016 in constant 2009 dollars. At the same time, OIRA's statutory responsibilities have grown through a wide variety of requirements, including: the Small Business Regulatory Enforcement Fairness Act, the E-Government Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Information Quality Act, the Regulatory Right-to-Know Act, the Small Business Paperwork Relief Act, and a variety of appropriations riders. See Comment Letter on Federal Regulatory Review from Paul R. Noe, American Forest & Paper Association, to OMB's Office of Information and Regulatory Affairs (March 16, 2009), citing Comment Letter on Federal Regulatory Review from Rosario Palmieri, National Association of Manufacturers, to OMB's Office of Information and Regulatory Affairs (March 16, 2009).

<sup>&</sup>lt;sup>33</sup> See, e.g., John D. Graham and Paul R. Noe, "Beyond Process Excellence: Enhancing Societal Well-Being," in <u>Achieving Regulatory Excellence</u>, Brookings Institution Press (2016) (discussing the institutional impediments in the Executive Branch to ensuring that regulations do more good than harm -- such as bureaucratic turf battles among the agencies, failure to utilize both internal and external expertise, bias, the mismatch between the vast volume of regulation and OIRA's shrinking resources, the large volume of "stealth regulation" such as guidance not submitted for OIRA review, lack of support for OIRA by varying administrations or leaders, and lack of judicial review for benefit-cost balancing – as well as the political impediments in the Executive Branch and Congress to ensuring that regulations do more good than harm).

<sup>&</sup>lt;sup>34</sup> John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016). <a href="https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/">https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/</a>

<sup>&</sup>lt;sup>35</sup> See Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (providing for EPA to mitigate unreasonable environmental effects).

<sup>&</sup>lt;sup>36</sup> See Whitman v. American Trucking Associations, 531 U.S. 457 (2001) (Section 109 of Clean Air Act does not grant EPA the authority to consider cost in setting National Ambient Air Quality Standards).

benefit-cost balancing unless it was clearly authorized in the regulatory statute.<sup>37</sup> But more recently, the Supreme Court has made quite clear that agencies have broad discretion to implement their regulatory statutes through benefit-cost balancing.<sup>38</sup>

Shortly after President Reagan's groundbreaking Executive Order 12291 imposed a cost-benefit test on regulations -- and three years before the Chevron USA v. Natural Resources Defense Council (1984)<sup>39</sup> decision deferring to EPA's interpretation of an ambiguous statute -- the Supreme Court held, in American Textile Manufacturers Institute v. Donovan (1981),<sup>40</sup> that the Occupational Safety and Health Administration was not **required** to engage in cost-benefit analysis in setting "feasible" public health and safety standards. But the majority also asserted in dicta that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."<sup>41</sup>

Twenty years later, in Whitman v. American Trucking Associations (2001), an unanimous Supreme Court found it "implausible" that the modest standard to set national ambient air quality standards at a level "requisite to protect public health with an adequate margin of safety" gave the EPA the discretion to determine whether costs should moderate the health standards. Writing for the Court, Justice Scalia stated that, to prevail in their quest to have the EPA take costs into account, the industry respondents would have to show a "textual commitment" of authority for the EPA to consider costs in standard setting, and "that textual commitment must be a clear one." Yet, in a prescient concurring opinion, Justice Stephen Breyer warned that the Court should resist

"a presumption, such as the Court's presumption that any authority the [Clean Air] Act grants the EPA to consider costs must flow from a "textual commitment" that is "clear." ... In order better to achieve regulatory goalsfor example, to allocate resources so that they save more lives or produce a cleaner environment- regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public hard. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language

<sup>&</sup>lt;sup>37</sup> See, e.g., Jonathan Cannon, "The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.," 34 Harv. Envir. L. Rev. 425 (2010); Amy Sinden, "Cass Sunstein's Cost-Benefit Lite: Economics for Liberals," 29 Colum. J. Envtl. L. 191, 240 (2004).

<sup>&</sup>lt;sup>38</sup> E.g., compare John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016). <a href="https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/">https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/</a> with Amy Sinden, "Supreme Remains Skeptical of the 'Cost-Benefit State," University of Pennsylvania Law School RegBlog (Sept. 26, 2016) <a href="http://www.regblog.org/2016/09/26/sinden-cost-benefit-state/">http://www.regblog.org/2016/09/26/sinden-cost-benefit-state/</a>; and see John D. Graham and Paul R. Noe, "A Reply to Amy Sinden's Critique of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 27, 2016) <a href="https://www.regblog.org/2016/09/27/graham-noe-reply-critique-cost-benefit-state">https://www.regblog.org/2016/09/27/graham-noe-reply-critique-cost-benefit-state</a>.

<sup>&</sup>lt;sup>39</sup> 467 U.S. 837 (1984).

<sup>&</sup>lt;sup>40</sup> 452 U.S. 490 (1981).

<sup>&</sup>lt;sup>41</sup> 452 U.S. at 509.

## of regulatory statuses as permitting, not forbidding, this type of rational regulation."42 (Emphasis added).

Finally, in Entergy Corp. v. Riverkeeper, Inc. (2009), the Supreme Court disposed of the dicta relating to a purported "presumption" against cost-benefit balancing. 43 Riverkeeper involved a challenge to an EPA regulation under section 316(b) of the Clean Water Act, which required that the EPA adopt a standard to "reflect the best technology available for minimizing adverse environmental impact." The EPA, with the strong encouragement of the White House Office of Management and Budget (OMB), based its standard on cost-benefit analysis. Although the statutory provision was silent on the use of costbenefit analysis, the Supreme Court applied Chevron deference in holding that "it was well within the bounds of reasonable interpretation for the EPA to conclude that costbenefit analysis is not categorically forbidden." Aligning the issue of agency authority to use cost-benefit analysis with Chevron, the Court reasoned that "it is eminently reasonable to conclude that" the Clean Water Act's "silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree." In so doing, the Court disavowed the purported "presumption" against benefit-cost analysis embodied in American Textile and limited American Trucking to "the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." The Court concluded that the Clean Water Act's silence "cannot bear that interpretation." 44

Riverkeeper raised the ante for agencies that ignore cost-benefit analysis. Although Riverkeeper did not require the agency to use cost-benefit analysis, its logical corollary is that an agency must now provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome. Otherwise, the agency's regulation could be vulnerable to an arbitrariness challenge under the Administrative Procedure Act.

That became quite clear in the Supreme Court's decision in Michigan v. EPA (2015), <sup>45</sup> which involved a challenge to the EPA's decision to regulate hazardous air pollutants, such as mercury, from power plants. Section 112(n) of the Clean Air Act authorizes the EPA to regulate hazardous air pollutants from power plants only if it concludes that regulation is "appropriate and necessary." In reaching that conclusion, the EPA had said that cost was irrelevant. The Court held that the EPA strayed beyond the bounds of reasonable interpretation in concluding that cost is not a relevant factor in determining whether to regulate under the "capacious" phrase, "appropriate and necessary."

<sup>&</sup>lt;sup>42</sup> 531 U.S. at 490.

<sup>&</sup>lt;sup>43</sup> 556 U.S. 208 (2009).

<sup>&</sup>lt;sup>44</sup> 129 S. Ct. at 1508.

<sup>&</sup>lt;sup>45</sup> 135 S. Ct. 2699 (2015).

Writing for a 5-4 majority in <u>Michigan</u>, Justice Antonin Scalia bluntly stated, "no regulation is 'appropriate' if it does significantly more harm than good." Quoting Justice Breyer's concurring opinion in Riverkeeper, Justice Scalia further reasoned that:

"Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost "46"

Notably, although the dissenters argued that the EPA could (and did) consider cost at the later stage in developing its regulation, all nine Justices agreed on the principle that, unless Congress states otherwise, "an agency *must take costs into account* in some manner before imposing significant regulatory burdens." (Emphasis added).<sup>47</sup>

The wisdom in Justice Breyer's <u>American Trucking</u> concurrence supporting cost-benefit balancing has prevailed. The Supreme Court now defers to agency interpretations of "silences or ambiguities in the language of regulatory statutes as **permitting**, **not forbidding**, this type of rational regulation."<sup>48</sup>

### B. The Need for Action

The importance of clarifying agency authority to use cost-benefit balancing should not be underestimated. The majority of environmental statutes -- and, to my knowledge, the majority of *all* regulatory statutes -- are silent or ambiguous on cost-benefit analysis. And agencies too often interpret such statutes as only allowing limited consideration of costs and benefits.

Within the broad range of relevant ambiguous statutes, three categories merit consideration – statutory provisions that: (1) are silent or ambiguous on the consideration of costs and lack a broad "omnibus factor," <sup>49</sup> (2) do not explicitly require benefit-cost analysis but authorize consideration of costs and/or contain one or more

<sup>&</sup>lt;sup>46</sup> 576 U.S. at , Slip Op. at 7-8 (emphasis added).

<sup>&</sup>lt;sup>47</sup> Under longstanding principles of administrative law, an agency may not lawfully neglect an important aspect of a problem. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Michigan v. EPA made clear that, unless Congress states to the contrary, cost is an important aspect of the problem of whether or not to regulate.

<sup>&</sup>lt;sup>48</sup> American Trucking, 531 U.S. at 490 (Justice Breyer, concurring) (emphasis added).

<sup>&</sup>lt;sup>49</sup> The term "omnibus factor" is used to capture broad, open-ended statutory decisional criteria that typically are intended to allow the regulatory agency to consider any factor important for determining the regulatory standard that might not otherwise be captured in the other decisional criteria specified by Congress.

broad omnibus factors, such as anything that the agency head considers "appropriate," "necessary," "relevant," "feasible," "reasonable," "in the public interest," etc., and (3) authorize benefit-cost analysis but are ambiguous on the extent or rigor of the benefit-cost balancing that may be done. (For examples of statutory provisions in each of these categories, see the Appendix attached to this testimony.) I believe that the Supreme Court decisions in <a href="Entergy Corp. v. Riverkeeper">Entergy Corp. v. Riverkeeper</a>, Inc. and <a href="Michigan v. EPA">Michigan v. EPA</a> advance benefit-cost balancing in interpreting all three subcategories of ambiguous statutes.

President Trump should take an historic step to enhance societal well-being by directing agencies, including independent agencies, to reexamine their statutory interpretations in light of <u>Riverkeeper</u> and its progeny and -- unless prohibited by law -- implement those statutes through cost-benefit balancing. As the Supreme Court has concluded, it is "eminently reasonable" to ensure that regulations do more good than harm.<sup>50</sup>

### III. Greater Transparency on Information Supporting Regulatory Decisions.

Agencies should be more transparent about key information – whether developed by third parties or by the agency –- supporting regulatory decisions. Key agency information and analyses that support important regulatory decisions, such as benefit-cost analyses and risk assessments, should be reproducible. Congressman Meadows' "CLEAR" Act (the "Comprehensive Listing of Evidence for Assessments of Regulations Act," H.R. 4230) relates to that concern. The CLEAR Act requires disclosure of research source code and data used by a Federal agency in assessing the costs and benefits of new regulations. It is important to protect personal and confidential information from disclosure, as section 2(a)(2) acknowledges.

Benefit estimates can be very hard for the public to understand, given the complexities and facets that are often hidden in the "black box." This challenge is especially true for benefit assessments under various environmental statutes, such as the Clean Air Act. In fact, according to the recent 2017 annual report from the Office of Management and Budget, \$182 to \$684.1 billion<sup>51</sup> or 80% of monetized benefits<sup>52</sup> (and 70% of costs) associated with Federal regulations reviewed by OMB over the last decade come from air regulations. The report goes on to caution that aggregate estimates of benefits and costs are "subject to some methodological variations and differing assumptions" over time that is especially true for EPA's air pollution regulations. <sup>53</sup> This observation highlights the importance of Agencies revealing the various inputs to these analyses working backwards from the monetized estimate to the underlying assumptions about

<sup>&</sup>lt;sup>50</sup> Riverkeeper, 129 S. Ct. at 1508.

<sup>&</sup>lt;sup>51</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, <u>Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act</u> (2017), at p. 11.

<sup>&</sup>lt;sup>52</sup> Id, p. 12;

<sup>&</sup>lt;sup>53</sup> Id., p. 21 & note 39.

studies used, cause and effect assumptions, model choices, treatment of confounding variables in modeling approaches, and distinguishing between associations and true causality, which has a much higher scientific standard to demonstrate.

### IV. Better Compliance with the Congressional Review Act.

### A. Background

Congress intended the reach and power of the Congressional Review Act (CRA) to be great because it felt there was an imbalance between Congress and the regulatory state – the so-called "fourth branch of government." Article I, Section 1 of the Constitution is quite clear: "All legislative powers herein granted shall be vested in a Congress of the United States . . ." (emphasis added). The legislative and policymaking power of the regulatory state has become enormous. The vast majority of "laws" governing our country are no longer enacted by the people's elected representatives in Congress, but are promulgated by agencies as regulations.

To put this is context, the Competitive Enterprise Institute publishes a chart they call the "Unconstitutionality Index," which compares the annual output of agency rules versus Congressional statutes. The contrast is quite striking: over a 15-year period, agency rulemaking output exceeded Congressional legislation by a factor varying from 12-fold to 51-fold, as shown in the following chart:

| The Unconstitutionality Index      |       |        |         |  |
|------------------------------------|-------|--------|---------|--|
| Public Laws vs. Agency Rulemakings |       |        |         |  |
| Year                               | Final | Public | THE     |  |
|                                    | Rules | Laws   | "INDEX" |  |
| 2003                               | 4148  | 198    | 21      |  |
| 2004                               | 4101  | 299    | 14      |  |
| 2005                               | 3975  | 161    | 25      |  |
| 2006                               | 3718  | 321    | 12      |  |
| 2007                               | 3595  | 188    | 19      |  |
| 2008                               | 3830  | 285    | 13      |  |
| 2009                               | 3503  | 125    | 28      |  |
| 2010                               | 3573  | 217    | 16      |  |
| 2011                               | 3807  | 81     | 47      |  |
| 2012                               | 3708  | 127    | 29      |  |
| 2013                               | 3659  | 72     | 51      |  |
| 2014                               | 3554  | 224    | 16      |  |
| 2015                               | 3410  | 115    | 30      |  |
| 2016                               | 3853  | 211    | 18      |  |
| 2017                               | 3281  | 117    | 28      |  |

Index: https://cei.org/blog/2018-unconstitutionality-index-28-federal-agency-rules-every-law-congress-passes

Moreover, the Judiciary has upheld practically every delegation by Congress to the agencies over the past 80 years so long as Congress identifies "an intelligible principle." The courts also have accorded great deference to agency interpretations of their statutes under Chevron<sup>54</sup> and deference to agency interpretations of their regulations under Auer v. Robbins.<sup>55</sup>

During the New Deal, Congress developed the legislative veto to curb the administrative state and added legislative veto provisions to hundreds of different statutes,<sup>56</sup> but the the Supreme Court declared the one-House legislative veto unconstitutional in <u>INS v. Chadha</u> (1983).<sup>57</sup> Consistent with the Bicameralism and Presentment Clauses of the Constitution, the Congressional Review Act was an effort to restore Congress' legislative and policymaking authority. As the joint statement of the bill managers stated:

<sup>&</sup>lt;sup>54</sup> 467 U.S. 837 (1984).

<sup>&</sup>lt;sup>55</sup> 519 U.S. 452 (1997).

<sup>&</sup>lt;sup>56</sup> See Paul J. Larkin, Jr., "Reawakening the Congressional Review Act, 41 Harv. J. of Law & Pub. Policy 187 (2017), at 194-96.

<sup>&</sup>lt;sup>57</sup> 462 U.S. 919 (1983).

"As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments. In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress that balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency." 58

In the CRA, Congress created a new chapter in the Administrative Procedure Act, chapter 8, of Title 5 of the United States Code. The CRA provides expedited procedures for Congress to review and possibly invalidate agency rules. After Congress receives a rule, a member can introduce a resolution to disapprove the rule, and the resolution is referred to the relevant committee. However, only 30 Senators or Representatives can discharge the resolution of disapproval from committee to the floor. In the Senate, there is no filibuster. A resolution can be brought up at any time, and it is not subject to amendment, point of order, or motion to postpone consideration. Debate is limited to a maximum 10 hours, evenly divided, and a motion to further limit debate is in order and not debatable.<sup>59</sup>

If a resolution of disapproval is signed into law by the President, the rule is invalidated, and "a new rule that is **substantially the same** as such a rule may not be issued" unless specifically authorized by a new statute. 60

The CRA also is very broad in scope. First, the CRA adopts the definition of "agency" in the Administrative Procedure Act (APA), 5 USC § 551(1). This includes independent regulatory agencies. Moreover, the CRA adapts the APA definition of a "rule" at 5 USC § 551(4). While the CRA has an exclusion for rules of particular applicability, a covered "rule" includes "the whole or part of an agency statement of general . . . applicability and future effect designed to *implement*, *interpret*, or *prescribe law* or *policy* . . . . " This includes not only legally binding regulations developed through notice and comment (known as "legislative rules"), but also *agency guidance* (known as interpretive rules or policy statements). As the legislative history states, the definition of a covered "rule" does not turn on whether a given agency must normally comply with the notice-and-comment provisions of the APA. Covered rules include those developed through: (1) formal rulemaking, under 5 USC § 556, § 557; (2) "informal" rulemaking, under 5 USC § 553; (3) "publication rules" -- statements of general policy and interpretations of general applicability required to be published in the Federal

<sup>&</sup>lt;sup>58</sup> Cong. Rec. S. 3683 (daily ed. April 18, 1996).

<sup>&</sup>lt;sup>59</sup> 5 U.S.C. § 802(d)(2).

<sup>&</sup>lt;sup>60</sup> 5 USC § 801(b).

Register under 5 USC § 552(a)(1)(D); and (4) all other rules that do not meet the procedural specifications of the first three classes (including guidance documents such as agency memoranda, frequently asked questions, letters, bulletins, circulars, manuals, etc.). 61

In the CRA, Congress exercised broad authority over all of those rules. The first provision of the CRA states: "Before a rule can take effect, the Federal agency promulgating such rule shall submit" to each House of Congress and to GAO a report containing a copy of the rule and a concise statement relating to the rule, including whether it is major, and the proposed effective date of the rule. 62 Moreover, the clock to introduce a joint resolution of disapproval using Congress' expedited review procedures does not start to run until "the later of the date on which the rule is published in the Federal Register or Congress receives the report submitted under § 801(a)(1). 63 In short, every "rule" -- legislative rule, interpretive rule, and policy statement -- that has not yet been properly submitted to Congress for its review is available for being considered under the Congressional Review Act today. 64 Moreover, agency non-compliance with the CRA submission requirement has called into question whether any rule that was not been submitted to Congress since the CRA was enacted is legally in effect. 65

### B. The Need for Action

Various reports indicate that agencies have failed to comply with the Congressional Review Act. In many cases, agencies have submitted their major regulations to Congress, but this commonly does not appear to be the case for many guidance (interpretive rules and policy statements), and to a lesser extent for non-major regulations. Most frequently, agencies have failed to submit to Congress rules that were not published in the Federal Register (which is common for informal agency interpretive rules and policy statements). Some researchers have counted thousands of rules that were not sent to Congress as required by the CRA. <sup>66</sup> The Pacific Legal Foundation

<sup>&</sup>lt;sup>61</sup> See Cong. Rec., S 3687 (daily ed. April 18, 1996).

<sup>62 5</sup> USC § 801(a)(1)(A).

<sup>63 5</sup> USC § 802(b)(2).

 <sup>&</sup>lt;sup>64</sup> See Larkin, "Reawakening the Congressional Review Act," supra note 56, at 214-15, 252; Todd F. Gaziano, Pacific Legal Foundation, Congressional Testimony, "Rulemakers Must Follow the Rules, Too: Oversight of Agency Compliance with the Congressional Review Act," before the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary (Sept. 28, 2017).
 <sup>65</sup> Id.

<sup>&</sup>lt;sup>66</sup> See, e.g., Curtis W. Copeland, "Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress" (July 15, 2014), available at <a href="https://www.redtaperoliback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf">https://www.redtaperoliback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf</a>; Congressional Research Service, "Congressional Review Act: Rules Not Submitted to GAO and Congress," Report R40997, (Dec. 29, 2009), available at <a href="https://redtaperoliback.com/wp-content/uploads/2017/04/CRS122909.pdf">https://redtaperoliback.com/wp-content/uploads/2017/04/CRS122909.pdf</a>; U.S. Government Accountability Office, "Federal Rulemaking:

launched a project tracking rules that have not been submitted to Congress, and they list on their website about 17 such significant rules.<sup>67</sup> The Brookings Institution also has issued a report finding that about 348 significant rules issued during the last two decades were not properly submitted to both Houses of Congress and the U.S. General Accountability Office (GAO), as required under the CRA.<sup>68</sup> Thus, the issue of agency non-compliance with the Congressional Review Act is ripe for Congressional inquiry.

### V. Conclusion.

In summary, the lack of transparency and accountability in our rulemaking process is longstanding and ripe for reform. To name just a handful of examples: (1) agencies should follow good guidance practices in developing and using guidance; (2) unless prohibited by law, agencies should interpret their regulatory statutes to fully comply with the longstanding presidential orders to ensure that their regulations provide benefits that justify the costs and maximize societal well-being; (3) agencies should disclose to the public the key information underlying important regulatory decisions; and (4) agencies should better comply with the Congressional Review Act.

Regulatory transparency is foundational to good government and long overdue. Thank you again for the honor to testify before you. I would be happy to address any questions you may have.

Perspectives on 10 Years of Congressional Review Act Implementation," GAO-06-601T (March 30, 2016), available at http://www.gao.gov/assets/120/113245/pdf

<sup>&</sup>lt;sup>67</sup> See https://www.redtaperollback.com/rules/

<sup>&</sup>lt;sup>68</sup> <u>See</u> Philip A. Wallach & Nicholas W. Zeppos, "How Powerful is the Congressional Review Act," Brookings Institution (April 4, 2017), available at <a href="https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/">https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/</a>.

### **APPENDIX – Categories of Regulatory Statutes**

| Silent or Ambiguous on Costs and Lack an Omnibus Factor |                        |                                                                                                                                                                                                                                                                                   |  |  |
|---------------------------------------------------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
| Statue                                                  | U.S. Code              | Regulatory Authority                                                                                                                                                                                                                                                              |  |  |
| Clean Water Act                                         | 33 USC § 1326(b)       | " reflect the <i>best</i> technology available for minimizing adverse environmental impact."                                                                                                                                                                                      |  |  |
|                                                         |                        | Entergy v. Riverkeeper: "best" in § 1326(b) can mean most cost-effective; benefit-cost balancing upheld.                                                                                                                                                                          |  |  |
| Resource<br>Conservation<br>and Recovery                | 42 USC § 6901          | "establish such standards as may be <i>necessary</i> to protect human health and the environment"                                                                                                                                                                                 |  |  |
| Act                                                     |                        | See MI v. EPA: refusal to consider cost in determining whether Clean Air Act regulation was "appropriate and necessary" was arbitrary and capricious under that "capacious" phrase.                                                                                               |  |  |
|                                                         |                        | eration of Cost and/or Include an Omnibus Factor                                                                                                                                                                                                                                  |  |  |
| Clean Air Act                                           | 42 USC § 7412(n)       | determine whether regulation is "appropriate and necessary"                                                                                                                                                                                                                       |  |  |
|                                                         |                        | MI v. EPA: refusal to consider cost was arbitrary and capricious under the "capacious" phrase of § 7412(n), "appropriate and necessary." "No regulation is 'appropriate' if it does significantly more harm than good."                                                           |  |  |
| Clean Water Act                                         | 33 USC<br>§ 1314(b)(2) | use "best technology economically achievable" (BAT). In assessing BAT, "take into account the cost of achieving such effluent reduction, non-water quality environmental impacts (including energy requirements), and such other factors as the Administrator deems appropriate." |  |  |

| 3. Clearly Authorizes Benefit-Cost Analysis, But Ambiguous on Extent or Rigor of Benefit-Cost Balancing |                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |  |  |
|---------------------------------------------------------------------------------------------------------|------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|
| Energy Policy<br>Conservation Act                                                                       | 42 USC § 6295(o) | Energy conservation standards must be " economically justified considering (I) the economic impact; (II) the savings in operating costs compared to any increase in the price of, or in the initial charges for, or maintenance expenses; (III) savings likely to directly result from the imposition of the standard (IV) any lessening of the utility or performance of the covered products; (V) the impact of any lessening of competition; (VI) the need for national energy and water conservation; and (VII) other factors as the Secretary considers relevant." |  |  |
| Dodd-Frank Act                                                                                          | 15 USC § 78c(f)  | Whenever SEC is required to consider whether an action is "necessary and appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."  Business Poundtable v. SEC, 647, E. 2d 1144, 1148, 49 (D.C. Gir.                                                                                                                                                                                                                         |  |  |
|                                                                                                         |                  | Business Roundtable v SEC, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (SEC's "failure to apprise itself – and hence the public and Congress – of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious").                                                                                                                                                                                                                                                                                                             |  |  |

### Message

From: Bolen, Brittany [bolen.brittany@epa.gov]

**Sent**: 7/25/2017 10:03:54 PM

To: Lovell, Will (William) [lovell.william@epa.gov]
CC: Dravis, Samantha [dravis.samantha@epa.gov]

**Subject**: Please print this

Attachments: M-17-24.pdf; ATT00001.txt

https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-24.pdf

### May 8, 2017

M-17-24

MEMORANDUM FOR: REGULATORY REFORM OFFICERS AND

REGULATORY POLICY OFFICERS

AT EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Dominic J. Mancini, Acting Administrator

Office of Information and Regulatory Affairs

SUBJECT: Guidance for Section 2 of Executive Order 13783, Titled

"Promoting Energy Independence and Economic Growth"

### Section I. Background

This memorandum provides guidance regarding Section 2 of Executive Order (EO) 13783, titled "Promoting Energy Independence and Economic Growth," published on March 28, 2017.

Section 2(a) of EO 13783 requires the head of each Executive Department and Agency (agency) to review all of that agency's existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.

Section 2(c) requires the head of each agency to submit to the Director of the Office of Management and Budget (OMB) by May 12, 2017, (*i.e.*, 45 days from the date EO 13783 was issued) a plan to carry out the review of agency actions discussed above. The plan shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality (CEQ).

An agency that determines that it does not have agency actions described above shall submit a written statement to the OMB Director to that effect and, absent a determination by the OMB Director that such agency has agency actions described in Section 2(a), shall have no further responsibilities under Section 2.

Sections 2(d) requires all agencies that submitted a plan to submit a draft final report by July 26, 2017, (*i.e.*, 120 days from the date EO 13783 was issued) to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of CEQ. The draft final report shall include specific

recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

Section 2(e) requires the report to be finalized by September 24, 2017, (i.e., 180 days from the date EO 13783 was issued) unless the OMB Director, in consultation with other Executive Office of the President officials who receive the draft final report, extends the deadline.

Agencies are encouraged to coordinate their compliance with Section 2 of EO 13783 with their compliance with EO 13777, which directs agencies to establish Regulatory Reform Task Forces to evaluate existing regulations generally and make recommendations to the agency head regarding their repeal, replacement and modification, consistent with applicable law. EO 13777 directs these task forces to seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations. As part of this outreach, agencies should seek input specifically regarding existing agency actions that potentially burden the development or use of domestically produced energy resources, and recommendations for actions the agency may take to alleviate or eliminate such burden.

### Section II. Application

The requirements in this guidance apply to all Executive Departments and Agencies, except for independent regulatory agencies, as defined in 44 U.S.C. 3502(5). This is the same group of agencies subject to the regulatory review requirements in Section 6 of EO 12866.

Independent regulatory agencies are encouraged to provide a plan and report in response to EO 13783, especially those independent regulatory agencies that directly regulate the development or use of domestically produced energy resources.

Section 2(a) of EO 13783 states, "[t]he heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order."

Section 2(b) of EO 13783 further defines "burden" as actions that "unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources."

The types of agency actions that are covered under Section 2(a) of EO 13783 include, but are not limited to, agency actions that materially:

- (1) Affect the design and/or location of domestic energy production;
- (2) Affect the design and/or location of drilling or mining of energy production resources; and

(3) Limit the use of certain sources of energy, such that the development of domestically produced energy resources from a certain sector may be negatively affected.

Agencies are not required to review agency actions that meet all of the following requirements:

- (1) Mandated by law;
- (2) Necessary for the public interest; and
- (3) Consistent with the policy set forth in Section 1 of EO 13783.

Agency heads should apply reasonable discretion in assessing which agency actions may rise to the level of potential burden on the development or use of domestically produced energy resources under EO 13783.

### Section III. Requirements

### A. Plan

As stated above, the heads of all agencies are required to provide a plan by May 12, 2017, to the OMB Director and also provide the plan to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the CEQ. The plan should include, at a minimum, how the agency intends to:

- (1) Identify agency actions or categories of actions that potentially burden the development or use of domestically produced energy resources;
- (2) Seek input from entities significantly affected by those agency actions;
- (3) Classify those agency actions;
- (4) Review those agency actions, including any quantitative analysis (e.g., costs, lost production) the agency plans to perform; and
- (5) Develop recommendations that could alleviate or eliminate the potential burden.

The classification should, at a minimum, identify the energy source potentially affected (e.g., oil, natural gas, coal, nuclear, renewable); the type of agency action (e.g., rule, order, guidance document, policy, or other similar agency actions); and whether the potential effects are direct or indirect. The classification should also identify actions that the agency believes are exempt because they are mandated by law, necessary for the public interest, and consistent with the policy set forth in Section 1 of EO 13783, along with a brief explanation of the basis for this determination.

If an agency does not believe that it has any agency actions that potentially burden the development or use of domestically produced energy resources, then the agency should state that in a written statement to the OMB Director, along with a brief explanation of the basis for this determination.

If an agency has actions that potentially burden the development or use of domestically produced energy resources, but does not believe that these actions are suitable for further review because they are mandated by law, necessary for the public interest, and consistent

with the policy set forth in Section 1 of EO 13783, then the agency should identify those actions in the written statement to the OMB Director, along with a brief explanation of the basis for this determination, no later than May 12, 2017.

If the OMB Director does not provide a determination within 30 days that the agency has agency actions as described in Section 2(a), then the agency will not be required to develop a plan or report.

### B. Report

The draft final report due to the OMB Director by July 26, 2017, should, at a minimum, include the following information:

- (1) The identification and classification of agency actions that potentially burden the development or use of domestically produced energy resources;
- (2) How the agency plans to seek input from entities significantly affected by agency actions that potentially burden the development or use of domestically produced energy resources;
- (3) Recommendations, consistent with law, that could alleviate or eliminate aspects of agency actions that burden domestic energy production or use;
- (4) The expected timeframe for when the recommendation would be implemented;
- (5) How the agency will track implementation, including points of contact;
- (6) To the extent feasible, preliminary estimates by agency action of the costs and cost savings, increased production, or other beneficial effects, that may be achieved by implementing each recommended action; and
- (7) Whether those actions have been identified as part of activities undertaken in compliance with <u>EO 13771</u> or <u>EO 13777</u>.

Agencies should attach the excel spreadsheet template provided with this guidance to the draft final report.

When estimating cost savings, agencies should use the guidance provided for EO 13771 and OMB Circular A-4. If an agency is unable to monetize the cost savings of a recommended agency action, the agency should describe qualitatively and include any planned future actions to determine the cost savings.

Agency recommendations are to be accomplished using existing resources.

The draft final report should be submitted by July 26, 2017, to the OMB Director and concurrently sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the CEQ. A copy of the draft final report should also be sent to the Administrator of the Office of Information and Regulatory Affairs, who will coordinate Executive Office of the President review, in consultation with the Assistant to the President for Economic Policy. Agencies should consider seeking public input on the draft final report, and should consult with OMB on appropriate means for doing so.

Agencies shall publish their final reports in the *Federal Register* and on the agency website, as well as submit copies to the OMB Director, the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the CEQ.

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Cost/Benefit Discussion (OW)
Start Time: Wed 3/27/2019 8:45:00 PM
End Time: Wed 3/27/2019 9:15:00 PM

Required Attendees: Siciliano, CarolAnn; Bolen, Brittany; McGartland, Al; Ross, David P; Kopits,

Elizabeth; Jones, Lindsey; Simons, Andrew; DCRoomARN3500/OPEI; Schwab,

Justin; Koslow, Karin; Prabhu, Aditi

Optional Attendees: Levine, MaryEllen; Zomer, Jessica

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject:Cost/Benefit Discussion (OW)Start Time:Tue 3/26/2019 8:00:00 PMEnd Time:Tue 3/26/2019 8:30:00 PM

Required Attendees: Bolen, Brittany; Ross, David P; Schwab, Justin; McGartland, Al; Jones, Lindsey;

DCRoomARN3500/OPEI; Siciliano, CarolAnn; Koslow, Karin; Simons, Andrew;

Prabhu, Aditi; Elizabeth Kopits

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Cost/Benefit Discussion (OW)
Start Time: Tue 3/26/2019 8:00:00 PM
End Time: Tue 3/26/2019 8:30:00 PM

Required Attendees: Bolen, Bowman; Ross, David P; Schwab, Justin; McGartland, Al; Jones,

Lindsey; DCRoomARN3500/OPEI; Siciliano, CarolAnn; Koslow, Karin; Simons,

Andrew; Prabhu, Aditi; Elizabeth Kopits

Optional Attendees: Levine, MaryEllen

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Cost/Benefit Discussion (OW)
Start Time: Tue 3/26/2019 8:30:00 PM
End Time: Tue 3/26/2019 9:00:00 PM

Required Attendees: Siciliano, CarolAnn; Bolen, Brittany; McGartland, Al; Ross, David P; Kopits,

Elizabeth; Jones, Lindsey; Simons, Andrew; DCRoomARN3500/OPEI; Schwab,

Justin; Koslow, Karin; Prabhu, Aditi

Optional Attendees: Levine, MaryEllen

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Cost/Benefit Discussion (OLEM)

**Start Time:** Tue 3/19/2019 7:30:00 PM **End Time:** Tue 3/19/2019 8:00:00 PM

Required Attendees: Bolen, Brittany; Jones, Lindsey; Schwab, Justin; McGartland, Al; Wright, Peter;

Hilosky, Nick; Siciliano, CarolAnn; Koslow, Karin; Simons, Andrew; Prabhu,

Aditi; Elizabeth Kopits

Optional Attendees: Michaud, John; Lewis, Jen

From: Bolen, Brittany Location: WJC North 5400

Importance: Normal

Cost/Benefit Discussion (OAR) Subject: Start Time: Tue 3/19/2019 1:30:00 PM **End Time:** Tue 3/19/2019 2:00:00 PM

Required Attendees: Bolen, Brittany; Wehrum, Bill; Woods, Clint; Schwab, Justin; McGartland, Al;

Jones, Lindsey; Siciliano, CarolAnn; Koslow, Karin; Simons, Andrew; Prabhu, Aditi; Elizabeth Kopits

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Meeting to Discuss Cost/Benefit ANPRM

**Start Time:** Mon 2/11/2019 4:00:00 PM **End Time:** Mon 2/11/2019 4:30:00 PM

Required Attendees: Bolen, Brittany; McGartland, Al; Elizabeth Kopits; William Lovell

(lovell.william@epa.gov); Siciliano, CarolAnn; Leopold, Matt (OGC); Schwab, Justin; Prabhu, Aditi; Veney, Carla; Scheuer, Amy; Shaffer, Patricia; Munis, Ken

### EPA-HQ-2019-7378

From: Bolen, Brittany

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Cost/Benefit Discussion (OLEM)

 Start Time:
 Tue 3/19/2019 7:30:00 PM

 End Time:
 Tue 3/19/2019 8:00:00 PM

Required Attendees: Bolen, Brittany; Jones, Lindsey; Schwab, Justin; McGartland, Al; Wright, Peter; Hilosky, Nick; Siciliano,

CarolAnn; Koslow, Karin; Simons, Andrew; Prabhu, Aditi; Elizabeth Kopits

Optional Attendees: Michaud, John; Lewis, Jen

### EPA-HQ-2019-7378

From: Bolen, Brittany

Location: DCRoomARN3500/OPEI

Importance: Normal

Subject: Cost/Benefit Discussion (OCSPP)

**Start Time:** Thur 3/21/2019 4:30:00 PM **End Time:** Thur 3/21/2019 5:00:00 PM

Required Attendees: Bolen, Bowman; Alexandra Dunn (dunn.alexandra@epa.gov); Beck, Nancy; Schwab, Justin; McGartland, Al;

Jones, Lindsey; Siciliano, CarolAnn; Koslow, Karin; Simons, Andrew; Prabhu, Aditi; Elizabeth Kopits

Optional Attendees: Cole, Joseph E.; Bertrand, Charlotte

### EPA-HQ-2019-7378

From: Bolen, Brittany
Location: WJC North 5400

Importance: Normal

Subject: Cost/Benefit Discussion (OAR)

 Start Time:
 Tue 3/19/2019 1:30:00 PM

 End Time:
 Tue 3/19/2019 2:00:00 PM

Required Attendees: Bolen, Brittany; Wehrum, Bill; Woods, Clint; Schwab, Justin; McGartland, Al; Jones, Lindsey; Siciliano,

CarolAnn; Koslow, Karin; Simons, Andrew; Prabhu, Aditi; Elizabeth Kopits

From: Idsal, Anne Location: WJC-N 5415

Importance: Normal

**Subject:** Meet w/NEDA re: Cost Benefit Rulemaking and SIP issues

**Start Time:** Fri 6/21/2019 5:00:00 PM **End Time:** Fri 6/21/2019 6:00:00 PM

Required Attendees: Idsal, Anne

Optional Attendees: Lewis, Josh; Jacks, Susan; Woods, Clint

Re: Would you come talk with us on June 21st about Cost Benefit Rulemaking?

NEDA Meeting Confirmation with Anne Idsal

From: Idsal, Anne [idsal.anne@epa.gov]

**Sent**: 5/30/2019 6:45:46 PM

To: Woods, Clint [woods.clint@epa.gov]
CC: Jacks, Susan [Jacks.Susan@epa.gov]

Subject: Re: Would you come talk with us on June 21st about Cost Benefit Rulemaking?

Would be happy to. Does this work on my calendar?

Sent from my iPhone

On May 30, 2019, at 2:35 PM, Woods, Clint < woods.clint@epa.gov> wrote:

Any interest in doing this? Unfortunately, I'm going to be out of town that day. This is an interesting group (can give you more background)

# Begin forwarded message:

From: Leslie Sue Ritts <a href="mailto:ritts@rittslawgroup.com">rittslawgroup.com</a>>

**Date:** May 30, 2019 at 12:28:51 PM EDT **To:** "Woods, Clint" < woods, clint@epa.gov>

Subject: FW: Would you come talk with us on June 21st about Cost Benefit

Rulemaking?

Dear Clint – NEDA is meeting on June 21 (at Marathon's offices), and I wondered if you might be able to meet with us on plans for the cost-benefit rulemaking (or we could come to you if that's easier). We also want to catch up on SIP issues like international transport following our meetings with OAQPS directors last month. I am reaching out because I heard from Tim Hunt that you had been able to meet with them last week. It would be terrifically helpful if you could give us an hour) on that Friday.

Many thanks and I hope your busy summer is going well.

<image001.png>

Leslie Sue Ritts Ritts Law Group, PLLC 7330 Mallory Circle Alexandria, VA 22315 (703) 823-2292 (office) (703) 966-3862 (cell) Iritts@rittslawgroup.com

# PRIVILEGE AND CONFIDENTIALITY NOTICE

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From: Idsal, Anne Location: WJC-N 5415

Importance: Normal

**Subject:** Meet w/NEDA re: Cost Benefit Rulemaking and SIP issues

 Start Time:
 Fri 6/21/2019 5:00:00 PM

 End Time:
 Fri 6/21/2019 6:00:00 PM

Required Attendees: Idsal, Anne

Optional Attendees: Lewis, Josh; Jacks, Susan; Woods, Clint

Re: Would you come talk with us on June 21st about Cost Benefit Rulemaking?

From: Bolen, Brittany
Location: WJC North 5400

Importance: Normal

Subject:Cost/Benefit Discussion (OAR)Start Time:Tue 3/19/2019 1:30:00 PMEnd Time:Tue 3/19/2019 2:00:00 PM

Required Attendees: Bolen, Brittany; Wehrum, Bill; Woods, Clint; Schwab, Justin; McGartland, Al;

Jones, Lindsey; Siciliano, CarolAnn; Koslow, Karin; Simons, Andrew; Prabhu,

Aditi; Kopits, Elizabeth

From: The Daily Signal [morningbell@heritage.org]

**Sent**: 10/4/2018 7:57:36 PM

**To**: McGartland, Al [McGartland.Al@epa.gov]

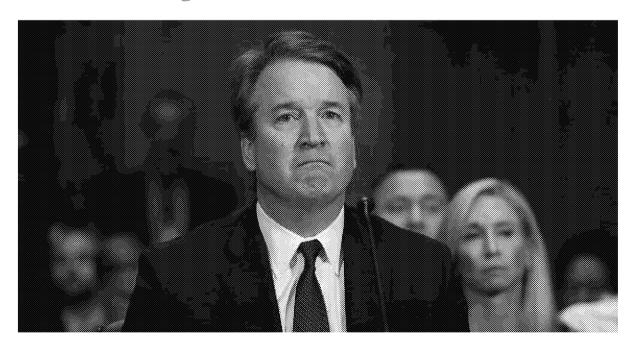
Subject: For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion



Oct. 4, 2018

COMMENTARY

# For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion



No matter how many women step forward to attest to Brett Kavanaugh's decency, liberals are convinced that

From: The Daily Signal [morningbell@heritage.org]

**Sent**: 10/4/2018 7:57:36 PM

To: McGartland, Al [McGartland.Al@epa.gov]

Subject: For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion



he doesn't care about women. For them, anyone not supporting legal abortion on demand doesn't care about women.

More

COMMENTARY

# The EPA Wants to Stop One of Its Costliest Abuses



From: The Daily Signal [morningbell@heritage.org]

**Sent**: 10/4/2018 7:57:36 PM

To: McGartland, Al [McGartland.Al@epa.gov]

Subject: For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion



Through the use of "co-benefits," the EPA has justified rules even though there may be few, if any, benefits connected to the purpose of a given rule.

More

**NEWS** 

# Kavanaugh Protesters Chase Down Rand Paul Inside DC Airport



As Paul was exiting the airport, several women began shouting at the senator, asking if he would call for an investigation of Supreme Court nominee Brett Kavanaugh.

More

COMMENTARY

On the Street: What Do Students of 2018 Think About the Allegations of 1982?

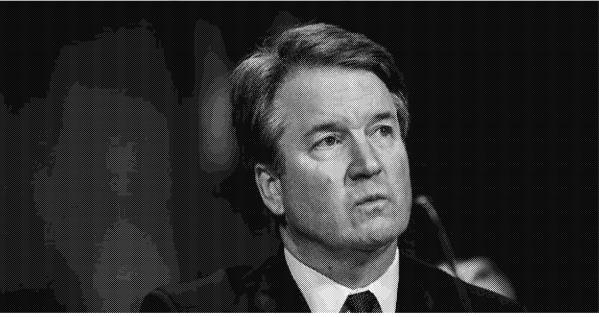
From: The Daily Signal [morningbell@heritage.org]

**Sent**: 10/4/2018 7:57:36 PM

To: McGartland, Al [McGartland.Al@epa.gov]

Subject: For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion





Are college students worried about what classmates may say about them 20 years from now? And how is all this affecting their beer consumption?

More

COMMENTARY

British Conservatives Are Growing Weary of Their Own Leaders

From: The Daily Signal [morningbell@heritage.org]

**Sent**: 10/4/2018 7:57:36 PM

To: McGartland, Al [McGartland.Al@epa.gov]

Subject: For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion





Almost no one turned up to hear about government policy on the environment, drugs, sports, or the media—but hundreds filled the side halls to cheer for free trade, to back Brexit, and to support a U.S.-U.K. free trade agreement.

More

NEWS

From: The Daily Signal [morningbell@heritage.org]

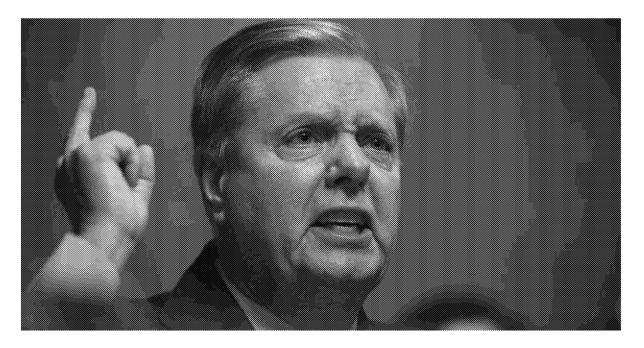
**Sent**: 10/4/2018 7:57:36 PM

To: McGartland, Al [McGartland.Al@epa.gov]

Subject: For the Left, 'Caring' About Women Means Support for Unrestricted Legal Abortion



Capitol Police Arrest Democratic Staffer Suspected of Doxing GOP Senators



Jackson Cosko, 27, whom police suspect of publicizing personal information about Sen. Lindsey Graham, R-S.C., most recently worked as an intern for Rep. Sheila Jackson Lee, D-Texas.

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IN CASE YOU MISSED IT

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The Political Pasts of the Lawyers Representing Kavanaugh Accusers



One ran for office multiple times as a Democrat. Another was a federal appointee of both Presidents Bill Clinton and Barack Obama. Still another defended the alleged misconduct of Democrat politicians.

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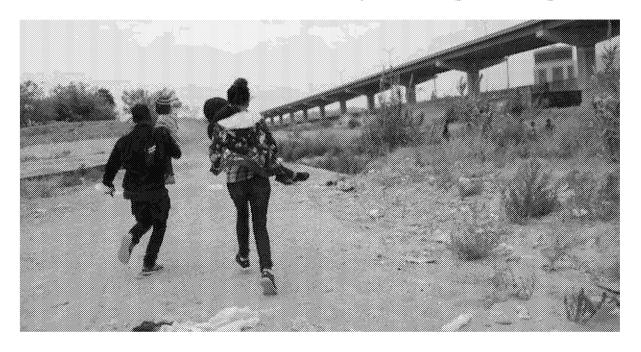
Subject: Mexico's Crackdown Nabs Nearly 800 Illegal Immigrants in 1 Day



June 17, 2019

**NEWS** 

# Mexico's Crackdown Nabs Nearly 800 Illegal Immigrants in 1 Day



By Jason Hopkins

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Authorities catch 791 illegal migrants found among four tractor-trailers stopped in the Gulf Coast state of Veracruz, indicating the Mexican government is stepping up enforcement under pressure from President Trump.

More

COMMENTARY

# What It Will Take to Rebuild and Sustain the Military



From: The Daily Signal [morningbell@heritage.org]

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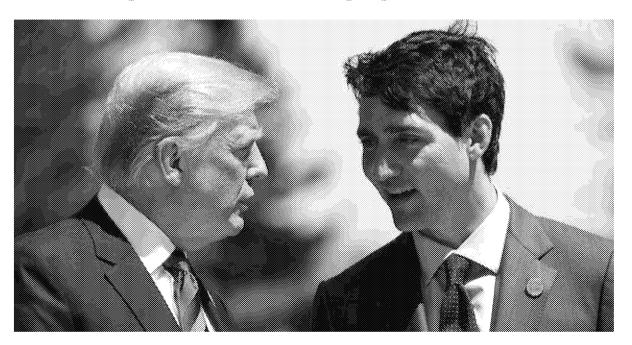
# By Dakota Wood

Our military shouldn't be committed without having been given the proper resources for equipping, training, and sustaining readiness over time.

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**ANALYSIS** 

# How Trump's Tax Cuts Are Helping the Middle Class



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By Rob Bluey and Virginia Allen

Tax expert Julio Gonzalez and economist Stephen Moore underline the benefits of the president's tax cuts for both small businesses and the middle class.

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NEWS

Supreme Court Upholds 'Double Jeopardy' Rule That Could Limit Trump Pardons

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# By Kevin Daley

The high court leaves undisturbed a legal rule allowing state and federal officials to prosecute individuals for the same conduct, despite the Constitution's ban on double jeopardy.

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COMMENTARY

Common Sense Finally Coming to EPA With Cost-Benefit Analysis

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# By Daren Bakst

EPA Administrator Andrew Wheeler has directed the agency to ensure that regulatory decisions "are rooted in sound, transparent, and consistent approaches to evaluating benefits and costs."

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COMMENTARY

Here's What Congress Can Do to Cut Waste and Debt

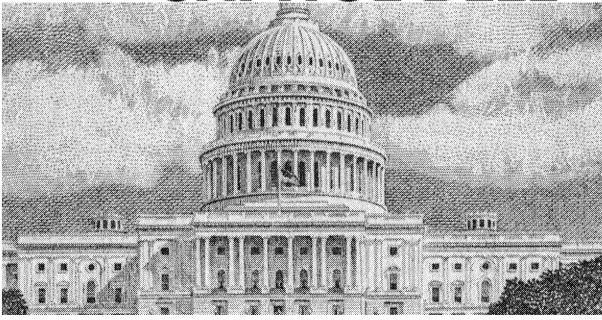
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# By Justin Bogie and Benjamin Paris

Much of a report from the Government Accountability Office complements proposals in The Heritage Foundation's "Blueprint for Balance" to rein in government spending and create a more accountable and effective budget process.

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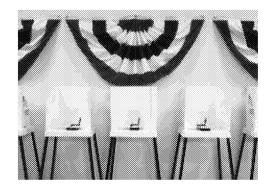
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19 Arrests Later, a Texas Town Is Torn Apart Over Voter Fraud



# **By Fred Lucas**

"Down here, voter fraud is not all that unusual," city planning consultant Richard Monte says. "It's unusual when they get prosecuted."

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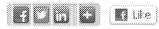
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# Regulation Digest

October 17, 2018 Vol. 7 No. 41 Edited by Bryce Chinault Tweet @RegStudies . Like us on Facebook Subscribe

# Marketplace of Ideas

# GW Regulatory Studies Center

- Report Card On Trump's Deregulatory Activity, Susan Dudley
- Fiscal Year 2018 Report on Regulatory Reform under Trump, Daniel Pérez
- 2018 Fall Unified Agenda, Daniel Pérez
- Public Interest Comment.
  IRS's Proposed Rule on
- SALT Credits Jerry Ellig

  E.O. 12866 A View from the House, Daniel Flores
- The Future of E.O. 12866. Embracing Regulatory Humility, Susan Dudley
- IRS Tax Credit Regulation
  Too Much SALT? Jerry Ellig

#### Amer. Action Forum

- Bank Capital Requirements: A Primer. Thomas Wade
- Regs Wrap-Up FY 2018.
   Dan Bosch
- Immigration Measure Drives Sizable New Costs Dan Goldbeck

# AEI

# **Feature Story**

# **OIRA Releases Fall Agenda & Regulatory Reform Report**

"The Trump Administration's Unified Agenda of Regulatory and Deregulatory Actions (Agenda) reports on the actions administrative agencies plan to issue in the near and long term. Released by the Office of Information and Regulatory Affairs, the Agenda demonstrates this Administration's ongoing commitment to fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burdens on the American people."

For analysis, see our commentaries by Daniel Pérez <u>here</u> and **here**.

# Rulemaking

# FCC Issues Wireless Broadband Acceleration Rule

The Federal Communications Commission issued a final rule on guidance to streamline wireless infrastructure siting review processes to accelerate the deployment of next-generation wireless facilities. The rule sets specific fee levels for the deployment of Small Wireless Facilities, and it addresses state and local consideration of related aesthetic concerns. The rule also issues new "shot clocks" to establish reasonable time frames for state and local regulatory reviews.

- Justice Kavanaugh and the administrative state. Peter Wallison
- HUD: Affirmatively Furthering Fair Housing, Edward Pinto
- New Patent Office guidelines bolster intellectual property owners' position, Michael Rosen
- Discussing the administrative state, Peter Walison

#### Bipartisan Policy Ctr.

<u>Building Evidence and</u>
 <u>Learning Agendas in</u>
 <u>Federal Agencies</u>, Oct 18

# Brookings

- A conversation with CMS Administrator Seema Verma, Oct 18
- CMS's Proposed Rule.
   "Medicare Shared Savings Program, Accountable Care Organizations-Pathways to Success". Matthew Fiedler
- HUD can't fix exclusionary zoning by withholding CDBG funds, Jenny Schuetz
- Betsy DeVos and her cone of silence on for-profit colleges, David Whitman & Arne Duncon
- A conversation with SEC Commissioner Kara Stein

# C. Boyden Gray Ctr.

• <u>Permits, Licenses, and</u> the <u>Administrative State</u> Oct 24

## Cato Institute

 Ben Carson Takes on High Housing Costs, Michael Tanner

# Ctr. for Prog. Reform

 Justice Delayed: Mercedes-Benz's Diesel Pollution Remains Unprosecuted, Joel Mintz
 The Major Rules Doctrine -A 'Judge-Empowering Proposition', Rena Steinzor

# CEI

- What Regulations Has the Trump Administration Eliminated So Far?, Clyde Wayne Crews
- This Week in Ridiculous Regulations, Ryan Young
- California's Attempt at Net Neutrality Clearly Unconstitutional, Ryan Radia

See also: Howard Beales' previous public interest comment.

# **DOT Proposes Vehicle Safety Standards**

The Dept. of Transportation is proposing to amend regulations related to lamps, reflective devices, and associated equipment to permit the adaptive driving beam headlight systems on newly manufactured vehicles after Toyota petitioned the National Highway Traffic Safety Administration. Comments due Dec. 11.

# EPA Proposes New Emission Standards

The Environmental Protection Agency is proposing to amend a June 2016 rule on the oil and natural gas sector which would reconsider fugitive emission requirements, well site pneumatic pump standards and certification requirements of closed vent systems. Comments due Dec. 17.

# **EPA Issues Drinking Water Test Procedure Rule**

The EPA is announcing the approval of alternative testing methods for measuring the levels of contaminants in drinking water and compliance with primary drinking water regulations. An additional 100 methods are being made available to analyze drinking water samples, which is expected to expedite the review process and reduce monitoring costs.

# **Agencies**

# ITC Investigation of US-Mex-Canada Trade Agreement

The International Trade Commission will be investigating the impact of the new USMC agreement on the U.S. economy and specific industry sectors. There will be a public hearing will be held in DC on Nov. 15, and submissions to appear at the hearing must be filed by Oct. 29.

See also: @RegStudies Report - US-EU Regulatory Cooperation: Lessons and Opportunities

# **Commerce Extends Consumer Privacy Comment Period**

The National Telecommunications & Information Administration is extending the comment period for its notice on advancing consumer privacy while protecting prosperity and innovation proposal. Comments are now due Nov. 9.

# In Opinion

- Jerry Ellig: IRS Tax Credit Regulation: Too Much SALT?
- Susan Dudley: Report Card On Trump's Deregulatory Activity
- Daniel Pérez: 2018 Fall Unified Agenda & Fiscal Year 2018
   Report on Regulatory Reform Under Trump

# **Federalist Society**

- <u>Litigation Update\_AT&T</u> and Time Warner Merger.
   Joshua Wright
- Deference to Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State Ronald Cass

# Heritage Foundation

California-Wide Web?
 Why Sacramento Can't Go
its Own Way on Net
 Neutrality, James Gattuso
 The Senate is Running
Out of Time to Make Up for
Missed Opportunities,
Norbert Michel

### Mercatus Center

- Reflecting on the Work of Bruce Yandle, conference featuring Susan Dudley
- Soft Law' is Eating the World, Hagemann, Huddleston Skees, & Thierer
- The FAA Reauthorization Could "Make America Boom Again", Andrea O'Sullivan

# The Reg. Review

- FDA Reform Needs to Look More Like Tax Reform, Ross Marchand
- Cities on the Forefront of Public Health Regulation.
   Jennifer Ko
- Restoring Science and Economics to EPA's Benefit Calculation, Jason Johnston
- With Liberty, Justice, and Money for All, Sam Moran
- Week in Review

## Wash, Legal Fdn.

 DOJ Issues New Guidance on Corporate Monitors Reflecting More Pragmatic Approach, Bowser & Garnett

## Yale Journal on Reg.

Big Day for Reg
Watchers! Bridget Dooling
 Review of Peter J
Wallison's Judicial Fortitude,
Alan Morrison

- Jim Norman: Americans Worry Less About Government Regulation
- Philip Wallach: The Taming of the Few
- John Birdsall: Is Lab-Grown Meat Ready for Dinner?
- Jenny Splitter: Consumers Aren't Confused By Plant-Based Milks, New Research Shows
- David Carter: The Case for USDA Organic
- Fred Krupp: Harness the Market to Manage the Climate
- lan Jefferies: <u>Automation Guidance Wise To Include</u>
   Railroads, But More Work Remains
- Jeff Bercovici: Silicon Valley's Giants Can't Avoid Regulation
   But Maybe They Can Control It
- Erin Dunne: Washington Wonks Love Tech Regulation More Than Regular Americans Do
- Nicolas Colin: Macron and Trump Are Racing To Win At Regulating Tech Companies
- Robert Graboyes: <u>Safety Versus Speed Drug and Device</u> <u>Approval Options</u>

# In the News

# **OIRA's Fall Unified Agenda**

Punching In: New Trump Regulatory Plan on the Way, Bloomberg

Regulatory Relief Efforts Deliver \$23 Billion In Regulatory Cost Savings, The White House

<u>Trump's Rulemaking Agenda Aims To Cut \$18B In Costs,</u> *Law360* 

What's Trump's agenda?, Politico

<u>Trump Administration Taking On Overtime Pay, Franchise Liability, Bloomberg</u>

The Trump Administration Hints at New Drug Pricing Regulations on Medicaid, Biologics, *StatNews* 

## **Congress & Regulatory Reform**

New Government Fear: Bots May Disrupt Regulatory Deliberations, Bloomberg

DeVos Will No Longer Seek to Delay Obama-Era Student Loan Regulations, *The Hill* 

N.Y, N.J. Ask IRS to Nix Proposed Limits on Charitable Deductions, *Bloomberg* 

Senate Confirms Climate Skeptic to Head DOJ Environment Office, The Hill

<u>Trump Administration Proposes Tough Rules on Protests</u>, *The Hill* 

<u>Critics Blast Proposed Regulations for Demonstrations on Park Service Land in D.C.</u>, Washington Times

# **Financial Markets & Housing**

SEC Chair Jay Clayton Says Quarterly Reporting Won't Change 'Anytime Soon', Wall Street Journal

US Regulators Lift Strict Oversight of Prudential, New York Times

Banks Take Fight Against New Loan-Loss Rule to Washington, Wall Street Journal

SEC Ruling Takes Aim at Stock-Exchange Profits, WSJ

CFPB to Define 'Abusive' Acts by Financial Firms, WSJ

# **Energy & Environment**

Wyoming Proposes Its Own Methane Regulations as Federal Level Sees Rules Relaxed, NPR

EPA to Kick Off Comment Period for Methane Pollution Rule Rollback, The Hill

E.P.A. to Disband a Key Scientific Review Panel on Air Pollution, New York Times

EPA Removes 22 Cleaned-Up Sites From Superfund List, The Hill

Trump Orders EPA To Lift Regulations On Ethanol, NPR

<u>Trump Administration Waives Environmental Laws to Build</u> <u>Border wall, Los Angeles Times</u>

EPA Search for Pruitt-Cited Climate Studies Comes Up Dry, Government Executive

EPA Puts Off Final Say on Science Transparency Rule, New York Times

# **Health & Safety**

<u>Deadly Limousine Crash In New York Brings Fresh Attention To Safety Regulation Loophole</u>, *NPR* 

<u>Pharmaceutical Lobby Rolls Out Changes To TV Ads To Head</u> <u>Off Regulation</u>, *Washington Examiner* 

### **Business**

Big Tech Prepares For Privacy Rules, Axios

DC Becomes New Front in War Over Airbnb, The Hill

Next On Tap For US Steelmakers -- Infrastructure, EPA, Energy Regulations: AISI, S&P Global

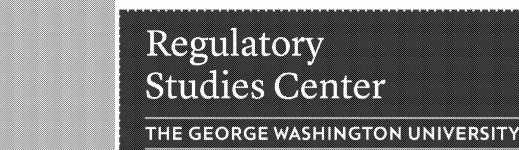
## **Technology**

<u>Ex-CFTC Chair Gensler Says Cryptocurrency Needs More</u> <u>Regulation Than Oil, Bloomberg</u>

SEC Halts Fraudulent ICO that Falsely Claimed Regulatory Approval, CCN

New York Attorney General's Probe Into Fake FCC Comments Deepens, Wall Street Journal

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Center Update, August 16

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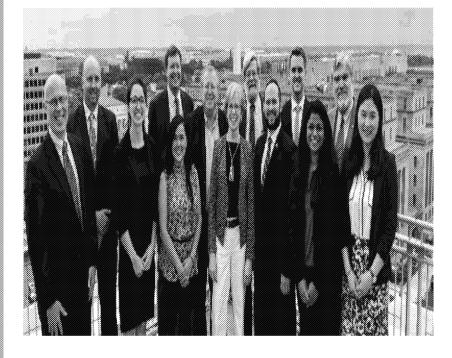
# Center Update

August 16, 2018



www.regulatorystudies.gwu.edu

This Monthly Update includes the latest research, opinions, and events from the GW Regulatory Studies Center



# Commentaries

Regulatory Sandboxes: The Future of Regulation?, by Motunrayo Bamgbose-Martins, 8/1

FCC Process Reform Underscores Need for Economic Review at Independent Regulatory Agencies, by Mark Febrizio & Samantha Day, 7/24

DHS Proposes Raising Barriers to Foreign Entrepreneurship in the U.S., by Lisa Zimmer, 7/16

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# Recent Research & Publications

Trump Administration Picks Up the Regulator Pace in Its Second Year, by Bridget C.E. Dooling



Significant regulatory activity declined dramatically by 74% - during the Trump Administration's first full year in office, compared to the same period in the Obama Administration. This was a profound disruption to the pace of regulatory activity at executive branch agencies. The first 6 months of the Trump Administration's second year reveal a quicker pace, with significant regulatory activity down 63%

compared to the same period in the Obama Administration. Overall, however, the Trump Administration's regulatory pace is 70% less than that of the Obama Administration in its first 18 months. This is a striking result for an administration that has made regulatory reform a signature issue. More...

RSC Scholars filed three separate Public Interest Comments on EPA's advanced notice: <u>Increasing</u> Consistency and Transparency in EPA's Benefit-Cost

Analysis, by Susan E. Dudley, Brian F. Mannix, & Joseph J. Cordes



Dudley's comment supports EPA's efforts to improve the transparency and consistency of the analysis supporting its significant regulations and, referring to the Consumer's Guide to Regulatory Impact Analysis, reviews ten tips for achieving this

objective. She encourages EPA, as a first step, to review all its statutory authority and, to the maximum extent possible, interpret its statutory standards through a lens of standard benefit-cost analysis principles. More...

# In the News

Federal News Radio, 70-Percent Drop in Significant Regulations in Trump Admin's First 18 Months, Bridget Dooling on Federal Drive with Tom Temin, 8/16

Government Executive, EPA's Bid for 'Consistent and Transparent' Rulemaking Draws Fire, quoting Joseph Cordes, Susan Dudley, & Brian Mannix. 8/14

Forbes, Documenting Deregulation, by Susan Dudley, 8/14

MLex US Tax Watch, Tax Reform Regulation Easily Clears OMB Hurdle, quoting Bridget Dooling, 8/10

Wall Street Journal,
Commissions Are
Mulvaney's Error of
Omission, by Susan Dudley &
Sally Katzen, 8/5

Washington Post, Fact Checker: Has the Trump Administration Repealed 22 Regulations for Each New One?, quoting Bridget Dooling & Susan Dudley, 8/3

# Noteworthy

Director Susan Dudley and Research Professor Brian Mannix published articles in the Supreme Court Economic Review titled, "Improving Regulatory Science: A Case Study of the National Ambient Air Quality Standards," and, "Benefit-Cost Analysis as a Check on Administrative Discretion," respectively.



Mannix's comment explores the reasons why the Environmental Protection Agency might choose to conduct a rulemaking on the general topic of how it considers benefits and costs, reviews some of the legal considerations that should be brought to bear on that effort, and recommends that the administration consider encouraging this type of activity in other agencies. More...

Co-Director Joseph Cordes published a review of Scott Farrow's book "Teaching Benefit Cost Analysis," for the Society for Benefit-Cost Analysis.

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# Cordes' added of regulatory

Cordes' comment discusses the valueadded of using benefit-cost analysis in the regulatory process, the extent to which guidance is presently available on the application of benefit-cost analysis to regulatory analysis, the specific issue of which stakeholders should receive standing

in benefit-cost analysis, and the inclusion of indirect effects, also referred to as co-benefits, in benefit-cost calculations. More...

# Upcoming Event

SAVE THE DATE!

# Celebrating 25 Years of Executive Order 12866: Reflecting On Its Longevity and Looking Into Its Future

The GW Regulatory Studies Center is co-hosting a forum with the Trachtenberg School of Public Policy and Public Administration, the American Bar Association, and the Society for Benefit-Cost Analysis on **Monday, September 24**. Details will be forthcoming, but plan to join us in the Jack Morton Auditorium that afternoon for a discussion with past and present leaders of the Office of Information and Regulatory Affairs and other special guests!

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# Monday, September 24, 2018

1:30 - 5:30 PM Followed by a Reception hosted by The Trachtenberg School of Public Policy & Public Administration

We will hear from current OIRA administrator, Neomi Rao, as well as administrators from the Clinton, Bush, and Obama Administrations. Senior career agency officials, key congressional staff, and other regulatory experts will join them to reflect on the past, present, and future of E.O. 12866.

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June 13, 2018 Vol. 7 No. 24 Edited by Bryce Chinault

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# Marketplace of Ideas

#### ACUS

 69th Plenary Session (Event June 14-15)

# AAF

- A Quiet Start To June, Dani Goldbeck
- The AT&T-Time Warner
  Decision, Will Rinehart

# AEI

- E-commerce could be revolutionized by 5G and virtual reality technology - if policymakers allow it, Roslyn Layton
- When did making customers happy become a reason for regulation or breakup?, Mark Jamison
- Celebrating internet freedom: What the Restoring Internet Freedom Order means for consumers: Daniel Lyons
- Unelected power Central banking, the regulatory state, and democratic legitimacy (Event, June 18)
- Assessing the administrative state (Event, June 19)

# **Brookings**

# Feature Story

# EPA advanced notice on transparency in benefit-cost analysis

In this advance notice of proposed rulemaking (ANPRM), EPA is soliciting comment on whether and how it should promulgate regulations that provide a consistent and transparent interpretation relating to the consideration of weighing costs and benefits in making regulatory decisions. EPA is also soliciting comment on whether and how these regulations could also prescribe specific analytic approaches to quantifying the costs and benefits of EPA regulations.

Also read: Consumer's Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker

# Rulemaking

# EPA proposes to retain current NAAQS for sulfur oxides

EPA published a proposed rule that would retain the existing primary national ambient air quality standards (NAAQS) for sulfur oxides (SOX) without revision. The current primary standard is set at a level of 75 ppb, as the 99th percentile of daily maximum 1-hour SO2 concentrations, averaged over 3 years. Comments are due by September 25.

# Interior reopens comment period on offshore wind rules

The Bureau of Ocean Energy Management seeks input regarding areas where offshore wind development on the Atlantic Coast

- The retirement revolution: Regulatory reform to enable behavioral change, Martin Baily & Benjamin Harris
- Improving efficiency in the health-care system, Kathleen Adams & Sara Markowitz
- A case against the General Data Protection Regulation, Niam Yaraghi
- A quick, bipartisan fix for America's slow infrastructure permitting. Philip Wallach & Nick Zaiac

#### CPR

 Trump's War on Progressive. Competitive Energy Markets. Hannah Wiseman

# Center for Public Integrity

 The basis for killing network neutrality rules is bogus, studies say, Aliya Sternstein & Joe Yerardi

#### CEI

- Last Chance for the 115th Bring Accountability to the Financial Regulators, Daniel Press
- How to Improve Rulemaking at the CFPB, Daniel Press
- Last Chance for the 115th
   Senate Should Pass AV
   START Act, Marc Scribner
- Putting the Net Neutrality Scare Stories to Rest, Richard Morrison
- This Week in Ridiculous Regulations, Ryan Young
- CEI Commends Judge's Approval of AT&T-Time Warner Deal in Antitrust Lawsuit

#### Federalist Society

Regulation (Teleforum)

Net Neutrality - CRA
Weekly Roundup
What to do about
Facebook On Data Privacy
and the Future of Tech

# GW Regulatory Studies Center

 U.S. and Canada Sign Agreement on Regulatory Cooperation, Susan Dudley
 Public Interest Comment on The Food Safety and Inspection Service's proposed rule: Egg. may or may not be appropriate, and what factors the BOEM should consider in the early stages of its future planning processes in that area. Comments are due by July 5.

# DHS interim final rule on air cargo screenings

U.S. Customs and Border Protection is amending its regulations pertaining to the submission of advance air cargo data to implement a mandatory Air Cargo Advance Screening (ACAS) program for any inbound aircraft required to make entry under the CBP regulations that will have commercial cargo aboard.

# FDA & HHS issue modifications to device standards

In <u>February 1998</u>, FDA announced the availability of a guidance entitled "Recognition and Use of Consensus Standards." The notice described how FDA would implement the program and provided the initial list of recognized standards. The guidance was updated in <u>September 2007</u> with <u>later modifications</u>. These notices describe the addition, withdrawal, and revision of certain standards recognized by FDA.

# EPA issues notice on risk evaluation of toxic substances

EPA is publishing and taking comments on the problem formulation documents for the first 10 chemical substances undergoing risk evaluation under the Toxic Substances Control Act (TSCA). The 10 problem formulation documents refine the scope documents published in June 2017 and are an additional interim step, prior to publication of the draft risk evaluations. EPA is also publishing and taking comments on a document entitled: "Application of Systematic Review in TSCA Risk Evaluations." Comments are due by July 26.

# **Agencies**

DOT announces two public meetings on automated vehicles
The Federal Highway Administration will conduct a series of
public meetings to seek input on the integration of automated
vehicles on the Nation's roadways that will be held at different
locations across the country. The Federal Motor Carrier Safety
Administration announces a public listening session on June 19,
2018, in Ann Arbor, MI to solicit information on issues relating to
the design, development, testing, and integration of ADSequipped CMVs on our Nation's roadways.

# In Opinion

- Daniel R. Pérez & Susan E. Dudley: <u>US-Canada regulatory</u> cooperation continues despite Trump's G-7 outburst
- Susan E. Dudley: There's the Beef But Where's the Cow?
- Ajit Pai: FCC chairman: Our job is to protect a free and open internet
- EDITORIAL: Cost-Benefit Reform at the EPA

<u>Products Inspection</u> Regulations, Richard Belzer

# Heartland Institute

 Providing Patients Hope with Right to Try (Podcast with Bartley Madden)

### Mercatus Center

 The Downstream Costs of Trade Remedy Regulations.
 Christine McDaniel & Veronique de Rugy

#### **NASEM**

 Assessing the Risks of Integrating Unmanned Aircraft Systems (UAS) into the National Airspace System

#### R Street

 Banning e-cigarette flavors isn't as simple (or useful) as the FDA thinks, Ann Phelan

# The Regulatory Review

- Taking a Gamble on Casino Regulation, Danielle Lazarus
- Department of Agriculture Withdraws Revisions to Organic Standards, Erin Quick
- <u>Regulating the Antibiotic</u> <u>Resistance Crisis</u>, Benjamin Barsky

# Resources for the Future

The Economics of Electricity System
Resilience (Webinar, June 18)
A Strategic Electricity
Generating Reserve Not Enticing Enough to Add to the Menu, Brian Prest & Karen

A Strategic Flooring Treest & Karen

The Economics of Electricity Services and Electricity Services

#### Yale JREG

Palmer

Regulating Equality.
 Unequal Regulation Life after Obergefell, Engram Wilkinson

- Farhad Manjoo: <u>How Net Neutrality Actually Ended Long</u> Before This Week
- Henry Miller & Jeff Stier: California's java joke is a wakeup call on cancer warnings
- Clyde Wayne Crews: What The AT&T-Time Warner Merger Decision Means For U.S. Regulation
- Naeem Aslam: Crypto Regulation: Who's Ahead, EU Or U.S.?
- David Flores: "Stopping rules" would say when it's time to shift from debating to acting
- Milton Ezrati: The Case for Collaborative Regulation
- Sean Speer: Despite G7 Tiff, US & Canada Can Cooperate on Regulatory Reform

#### In the News

# **Congress & Regulatory Reform**

Trump seeks to reorganize the federal government, Politico

Senate bill increases funding for FAA commercial space office but seeks regulatory reform, Space News

# **Financial Markets & Housing**

<u>Latest Casualty of Government Regulation: Bail-Bond Insurance,</u>
Wall Street Journal

# **Energy & Environment**

EPA to review how it adds up the economic pros and cons of environmental rules, Washington Post

Groups want more time to comment on cost-benefit proposal, E&E News

<u>Harvard president denounces proposed EPA regulations on use of scientific research, Boston Globe</u>

EPA to consider changing how it weighs costs, benefits of regulations, *The Hill* 

Industry applauds move to 'sustainable regulation', E&E News

## Health & Safety

<u>Podcast: KHN's "What The Health" Health Care Politics, Midterm</u> Edition, *Kaiser Health News* 

White House taps the brakes on HHS religious rule, Modern Healthcare

## **Business**

What Regulatory Worries? Global Tech Stocks Reach New Heights, Wall Street Journal

Taking Flight: Regulating Our Skies, Washington Post

Why the AT&T-Time Warner Case Was So Closely Watched, New York Times

Regulations and permit headaches keep food trucks from cruising down Easy Street, USA Today

# **Technology**

The Net Neutrality Repeal Is Official. Here's How That Could Affect You., New York Times

FAA's Safety Rules for Commercial Drones Are Overly Strict, Report Says, Wall Street Journal

SEC's 'Crypto Czar' Says Smart Contracts Can Help Regulation, Fortune

Regulatory Concerns Dampen Bitcoin Volatility, Forbes

<u>Crypto companies 'running towards' regulation is good for bitcoin, analyst Tom Lee says, CNBC</u>

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July 11, 2018 Vol. 8 No. 27 Llw Bryce Chinault

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#### Marketplace of Ideas

#### AAF

- Regulatory Proposals Lead The Way, Dan Goldbeck
- Stress Tests Demystified.
   Douglas Holtz-Eakin
- Deregulatory Actions On The Move Dan Goldbeck
- Comparing Effectiveness of Climate Regulations and a Carbon Tax, Rossetti, Bosch, & Goldbeck

#### AEI

Is Self-Regulation an Option for Cryptocurrency Exchanges? Bronwyn Howell
 GDPR: Privacy as Europe's Tariff by Other Means? Daniel Lyons

#### **Brookings**

- Where and Why Has Agency Rulemaking Declined Under Trump?
   Connor Raso
- Under the Radar The Supreme Court Decision Brett Kavanaugh is Most Likely to Overrule, William Galston
- How to Build 5G Networks in the U.S. Jack Karsten

**Editor's Note:** Today's edition covers the past two weeks of updates. We hope you had a happy Fourth of July!

#### Regulation Digest

#### **Feature Story**

#### EPA proposes increased biofuel mandates for 2019

EPA published a proposed rule setting the Renewable Fuel Standards for 2019, mandating ethanol, biodiesel, and cellulosic ethanol to be blended into transportation fuel. The rule requires 19.88 billion total gallons of biofuel to be blended in 2018, a 60 million gallon increase from 2018 levels. EPA has scheduled a public hearing in Ypsilanti, MI on July 18.

• Read our related analysis of the Renewable Fuel Standard, a case for reform, and Forbes op-ed.

#### Rulemaking

#### DHS & State Dept. Issue Immigration Rule

DHS finalized amendments to eliminate the <u>nonimmigrant visa</u> <u>exemption</u> for certain Caribbean residents seaking to come to the US as H-2A agricultural workers, and the State Department issued further clarifications.

 Read Daniel R. Pérez & Lisa A. Zimmer's comment on the International Entrepreneur Parole Program.

**EPA Proposes Decreased Lead Standards** 

- Why Undermining Fuel Efficiency Standards Would Harm the US Auto Industry. Helper, Miller, & Muro
- Repeal of Open Internet Rule Enables Monopoly Networks, Tom Wheeler
- Global Manufacturing Scorecard: How the US Compares to 18 Other Nations, West & Lansang

#### Cato Institute

- The Jones Act A Burden America Can No Longer Bear, Grabow, Manak, & Ikenson
- <u>CFPB Remains</u>
   <u>Unconstitutional</u> Ilya Shapiro
   How Innovation Drives
- How Innovation Drives
   Financial Inclusion, Diego
   Zuluaga

#### Ctr. for Prog. Reform

- If Confirmed, Kavanaugh Would Tilt Supreme Court against Public Protections, Matt Shudtz
- Small Business
   Administration Brings New
   Win-Win' Approach to
   Regulations, James Goodwin
- The Chevron Doctrine: Is it Fading? Could that Help Restrain Trump?, Daniel Farber

#### CEI

- Pruitt Leaves EPA Well Positioned to Advance Trump Pro-Growth Agenda. Marlo Lewis, Jr
- This Week in Ridiculous Regulations (July 6 & July 2)
- Environmental Protection Agency to Streamline Permits for Major Projects, Ben Lieberman
- Reforming Waters of the United States' Critical for Economic Growth, Myron Fhell

#### **Federalist Society**

- The Department of Energy's Actions to Save Nuclear and Coal, Teleforum
  EPA's CAFE What's on
- the Menu for Fuel Economy and Greenhouse Gas Standards?, Teleforum
- The Deregulatory Landscape Philip Hamburger

#### GW Reg Studies Ctr.

Public Interest Comment
 Removal of the International

EPA is proposing to lower the Dust-Lead Hazard Standards from 40  $\mu$ g/ft2 and 250  $\mu$ g/ft2 to 10  $\mu$ g/ft2 and 100  $\mu$ g/ft2 on floors and window sills, respectively. Comments due by August 16.

#### **FHA Issues Final Rule on Home Inspections**

The Federal Housing Administration is streamlining the inspection requirements for FHA single-family mortgage insurance by removing the regulations for the FHA Inspector Roster. The Roster is a list of inspectors approved by FHA as eligible to determine if the construction quality of a one- to four-unit property is acceptable as security for an FHA-insured loan.

#### **EPA Proposes Cross-State Air Pollution Rule**

EPA is proposing an update to determine the interstate rule for the 2008 ozone National Ambient Air Quality Standards. The rule proposes minor revisions to existing regulations. Comments due by August 31.

EPA Extending Compliance for Petroleum Refinery NESHAP

EPA is proposing to delay the compliance date for maintenance vents located at sources constructed on or before June 30, 2014 under the National Emission Standards for Hazardous Air Pollutants refinery rules from August 1, 2018 to January 30, 2019. Comments due by August 9.

#### **Agencies**

#### **EPA Extends Comment Period on Transparency Rule**

The, "Increasing Consistency and Transparency in Considering Costs and Benefits in Rulemaking Process," comment period has been extended by 30 days to August 13.

• Read Reg Studies' Consumer's Guide to Regulatory Impact Analysis.

#### FCC Extends Comment Period on 2.5 GHz Band Rule

The Federal Communication Commission is seeking comments on proposed service rules that allow more efficient and effective use of 2.5 GHz band, and is extending the comment period by 30 days to August 8.

#### MSHA Seeks Comments on Coal Mine Dust Exposure

The Mine Safety and Health Administration is seeking to develop a framework to study the impact of the "<u>Dust Rule</u>," and further information on means to lower miners' exposure to respirable coal mine dust. Comments are due by July 9, 2019.

#### In Opinion

- Bridget C.E. Dooling: <u>Justice Kennedy's Parting Swipe</u> Against Judges Deferring to Administrative Agencies
- Susan E. Dudley: Pruitt's Legacy at EPA
- EDITORIAL: Pruitt Drowns in the Swamp
- Daniel Turner: Return the EPA to the States
- John Fund: Why EPA's Scott Pruitt Had to Go (and What to Expect From the EPA Now
- Myron Ebell: Andrew Wheeler Keeps a Low Profile at the EPA, Gets Things Done

Entrepreneur Program, Daniel R. Perez & Lisa A. Zimmer

Regulators' Budget.
OIRA's Growth and the
Future of Regulatory
Reform, Julie Balla

#### Heritage Foundation

- Government
  Reorganization Plan: A
  Good Start but Needs Some
  Improvement, Norbert Michel
- Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers, David Burton
- Should States Allow Insurers to Offer Bare-Bones Health Plans with Fewer Mandated Benefits?, Doug Badger

#### Mercatus Center

- A Snapshot of Indiana Regulation in 2018, James Broughel & Jonathan Nelson
- Regulator Discretion at the State Level, Broughel & Catherine Konieczny
- Do You Need a License to Innovate? Jennifer Huddleston Skees
- What Happens if Cryptocurrency
   Technologies are Regulated as Securities?, Andrea O'Sullivan

#### Niskanen Center

- How Can the FDA Foster Greater Resilience in the Medical Marketplace?, Gulfo & Briggeman
- The Health Care
  Revolution Needs Artificial
  Intelligence. Ryan Hageman &
  Anastasia Greenberg

#### R Street

 What's in Andrew Wheeler's EPA Wheelhouse? William Murray
 CAFE Standards, William Murray & Ian Adams

#### The Reg. Review

- Enforcing the Fair Credit Reporting Act Through Private Actors, Patricia Liverpool
- Voters' Distrust of Legislators Drives Agency Lawmaking, Patrick Reischl
- Improving Federal
   Regulation of Medical
   Algorithms, Benjamin Bareky

- Jason Grumet: A New Climate of Realism Emerges in Energy
  Debate
- Aaron Klein: Banklike Credit Unions Should Follow Bank Rules
- EDITORIAL: A Risky Drug Approval Lesson
- Lindsey Stroud: Public Health Groups Should be Applauding Big Tobacco's Harm Reduction Efforts
- Henry Miller & Jeff Stier: <u>USDA Moves to End Rent-Seeking</u> in Poultry Industry
- EDITORIAL: The Taxi Empire Strikes Back
- Wayne Crews: What Do Scholars Say About the <u>Conceptual</u> & <u>Empirical</u> Relationship Between Regulation & Entrepreneurship
- Steve Allocca: Regulating Disruption: Lessons from Facebook, Uber and LendingClub
- Dan Backer: <u>Free Speech Means a Free Internet Even If</u>
   Democrats Don't Like It
- Jonathan Wood: <u>California Should Turn to Markets to Solve</u> Its Water Woes
- Steven Greenhut: California's 'Net Neutrality' Bill is About National Politics, Not Policy
- Robert Hackett: <u>Facebook's Crypto Ad Ban Hurt Competition.</u> <u>Regulators Should Scrutinize It.</u>
- **Jyoti Bansal**: The Self-Regulation Window is Closing for Tech Companies
- Jimmy Quinn: Can Trump Make the Bureaucracy Sane Again?
- Baylen Linnekin: <u>Trump's Proposal to Reform Federal Food</u> <u>Regulations is Long Overdue</u>
- Richard Williams: <u>Time to Celebrate Red, White, Blue Not Red Tape</u>

#### In the News

#### **Congress & Regulatory Reform**

Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State, Wall Street Journal

<u>Trump Signs Order Giving Agency Heads More Power to Appoint</u> Regulatory Judges, *The Hill* 

#### **Financial Markets & Housing**

Mulvaney's Challenger Is Leaving CFPB, Wall Street Journal

<u>How Regulators Averted a Debacle in Credit-Default Swaps</u>, *Wall Street Journal* 

Best Interest Concept Here to Stay Despite Death of Fiduciary Rule, Says Prominent Law Firm, Forbes

<u>Fed's Quarles Defends Global Regulatory Bodies</u>, Wall Street Journal

Security or Commodity? Cato Institute Rolls Out Dual-Tier ICO Regulation Proposal, Forbes

#### **Energy & Environment**

Ex-Coal and Energy Lobbyist Named Acting EPA Chief, Wall Street Journal

- Getting Railroads to
   Regulate Sleep Disorders,
  Sarah Madigan
- The Supreme Court's 2018 Regulatory Term, Series
- The Quagmire Created by National Association of Manufacturers v. DOD, Joel Beauvais
- Uber and Lyft Lobby Their Way to Deregulation and Preemption, Leigh Anne Schriever
- Week in Review (June 29 & July 6)

#### Wash, Legal Fdn.

 USDA Bioengineered' Food Labeling

#### Yale Journal on Reg.

- <u>Reviewed</u> A Special <u>Judge Kavanaugh Edition</u>, Aaron Nielson & Jenn Mascott
- Administrative Law's
   Ordinary Remand Rule,
   Chris Walker
- <u>Chevron in the</u> <u>States: Wisconsin Update</u>. Aaron Saiger

Who is Andrew Wheeler, EPA's New Acting Chief?, The Hill

<u>Pruitt is Gone. but these Five E.P.A. Policy Battles are Still</u> Ahead., *New York Times* 

Developers Go With the Flow as New Water Rules Kick In, Wall Street Journal

EPA Takes Next Step Toward Replacing Obama-Era Climate Rule, The Hill

Pruitt Grants Loophole to 'Super Polluting' Diesel Truck Manufacturers on Last Day at EPA, The Hill

Greens Win Court Case Seeking Stronger Air Pollution Rules for Brick Makers, The Hill

#### **Health & Safety**

Airlines Dodge Minimum Seat Size as FAA Sees No Safety Issue, Bloomberg

FDA Pledges 'Efficient Regulation' of Mobile Health Apps, Helathcare Dive

FDA Green-Lights 14 Digital Health Products, Continues to Evolve Regulations, *MobiHealth News* 

<u>Supreme Court Nominee Brett Kavanaugh Could Leave His Mark</u> on Many Health Care Cases, *NPR* 

#### **Business**

Four Words Missing in the New Tax Law Give Restaurants Heartburn, Wall Street Journal

FAA Declines to Regulate Seat Size on Aircrafts, The Hill

<u>Top Oil Market-Maker Closes After 'Damaging' Regulatory Changes</u>, *Bloomberg* 

#### **Technology**

Calif. Lawmakers Reach Agreement on Strict Net Neutrality Legislation, *The Hill* 

<u>Federal Court Rules Against Drone Hobbyist, Sets Stage for</u> Regulations, *The Hill* 

Forget Crypto? Centralized Virtual Currencies Greater Threat to U.S. Elections, Expert Tells Senate, Forbes

Crypto Industry Frustrated by Haphazard Regulation, New York Times

Other Countries Forge Ahead on Crypto Regulations, New York Times

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## **Regulation Digest**

June 12, 2019 Vol. 8 No. 22 Edited by Bryce Chinault

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#### Marketplace of Ideas

#### GW Regulatory Studies Center

- The Relationship Between Regulatory Form & Productivity: An Empirical Application to Agriculture. USDA / RSC Report
- Research Brief Why Should We Focus on the Form of Regulation?, Zhoudan Xie
- Updated Reg Stats

#### **Brookings Institution**

 After years of lagging behind the international community, will the US begin to rein in 'big tech'? Clara Hendrickson

#### Cato Institute

- The Fairness Doctrine Was Terrible for Broadcasting and It Would Be Terrible for the Internet, Paul Matzko
- EPA Co-benefits Are Fine, But the Agency Must Tell the Whole Story, William Yeatman
- When Regulators Are Also Competitors, Podcast

CAP

#### **Agency Rulemaking Highlights**

#### Patients Over Paperwork

The Centers for Medicare & Medicaid Services issued a request for information seeking public comment on ideas for regulatory, subregulatory, policy, practice, and procedural changes that reduce unnecessary administrative burdens for clinicians, providers, patients, and their families. Comments due August 12.

#### Railroad Safety

The Federal Railroad Administration, after receiving petitions, issued a notice of proposed rulemaking to reconsider the agency's requirement for commuter and intercity passenger railroads to develop and implement a system safety program. Comments due August 12.

#### Genetically Engineered Organisms

The Animal & Plant Health Inspection Service issued a proposed rule to comprehensively revise they agency's regulations regarding the movement of certain genetically engineered organisms to create a regulatory pathway for innovators. The agency seeks to allow for the development of new and novel organisms that are unlikely to pose plant pest risks. Comments due August 5.

-- Article from The National Law Review.

 Bolstering the Public Voice in Accreditation, Ben Miller

#### CPR

 Updates on the War on Science, Daniel Farber

#### CEL

- Transforming Surface Transportation
   Reauthorization, Marc Scribner
- EPA Streamlines
  Infrastructure Approval
  Process under Clean Water
  Act. Ben Lieberman
- <u>SEC's 'Regulation Best</u> Interest' Respects Investor Choice, John Berlau
- This Week in Ridiculous Regulations, Ryan Young

#### **Federalist Society**

- Antitrust & Big Tech, Video
- Before and After A
  Bipartisan Effort to Improve
  Federal Regulations, Eileen J.
  O'Connor
- Dear Colleague Guidance Documents & Executive Agencies, Lucas Vebber

#### GAO

 Changes to Legal Framework Needed to Address Gaps in Consumer Privacy, June 11 Report

#### **Heritage Foundation**

- The SEC, Entrepreneurship, FinTech and the Economy, June 25
- Common Sense Finally Coming to EPA With Cost-Benefit Analysis, Daren Bakst

#### **Hoover Institution**

 Tools of Regulatory Reform.
 Maintaining Executive & Constitutional Order, June 21

#### Inst. for Policy Integrity

 EPA Science Advisory Board Input\_Bethany Davis Not!

#### Mercatus Center

 Facebook & Antitrust, <u>Part 1</u>
 <u>Part 2</u>, Adam Thierer & Jennifer Huddleston

#### E-Cigarette Guidance

The Food & Drug Administration issued guidance for industry on how to prepare premarket tobacco product applications for electronic nicotine delivery systems.

#### E15 Fuel Regulations

The Environmental Protection Agency is adopting a new statutory interpretation to allow gasoline blended with up to 15% ethanol to be eligible for the Reid Vapor Pressure waiver under the Clean Air Act.

#### Airworthiness Directives - Boeing

The Federal Aviation Administration issued two final rules approving airworthiness directives for various Boeing aircrafts. The directives review the safety status of multiple <u>fasteners</u> and <u>lugs</u>.

#### In Opinion

- Susan Dudley: Competition Can Be Good for Regulators
  Too
- WSJ Editorial: Big Tech in the Dock
- NYT Editorial: Why Is America So Far Behind Europe on Digital Privacy
- Chirantan Chatterjee: The Devil is in the Device, Not the Platform
- Bethany Davis Noll & Richard Revesz: It's a Bad Idea to Pick a Fight with California On Car Emissions
- Benedic Ippolito: Get Rid of Surprise Medical Bills
- Alex Muresianu: Federal Hospital Regulations Are a Competition-Killing Mess. A New Bill Promises To Fix That.
- Diego Zuluaga: The SEC Can't Keep Kik-ing the Crypto Can Down the Road
- WSJ Editorial: Fiduciary Rule Fixer-Upper
- Bert Ely: <u>Reducing Banks' Regulatory Burden is Easier</u>
   Said Than Done
- Kurt Schacht: Swipe Left On the SEC's Investor-Protection Rule
- Scott Shackelford: Companies' Self-Regulation Doesn't Have to Be Bad for the Public
- Jessica Melugin: Conservatives Who Want Facebook, Other Social Media Regulated Should Think Twice
- Amandeep Khuruna: One Year Into GDPR: A Look Ahead
   At The Privacy Regulation Compliance Landscape

#### In the News

#### **Congress & Regulatory Reform**

<u>Treasury issues final rules to block blue-state workarounds to SALT deduction cap</u>, *The Hill* 

Senators to review impacts of WOTUS rulemaking, E&E News

 Want Higher Healthcare Costs? Try Mandatory Price Transparency, Elise Amez-Droz & Andrea O'Sullivan

#### Public Citizen

 Under Trump, Wall Street Watchdog Takes a Bite Out of Investors' Wallets, Bartlett Naylor

#### RFF

 How Clean is "Refined Coal"? An Empirical Assessment of a Billion-Dollar Tax Credit, Brian Prest & Alan Krupnick

#### The Regulatory Review

- The Potential Consequences of the Smoke-Free Public Housing Rule, Ben Barsky
- FTC v. Qualcomm, Antitrust, and Intellectual Property. Erik Hoverkamp
- OMB's New Approach to Agency Guidance Documents, Paul Larkin, Jr.
- <u>Is Insurance Regulation</u> <u>Unconstitutional?</u> Stefanie Ramirez

#### Various Sources

 In the Case of Statutory Ambiguity, Who Decides? -Chevron Revisited, June 13

#### Washington Legal Fdn.

 Bait-and-Switch: Federal Judge Holds that EPA Violated the APA when Defining
 "WOTUS" Noah Hearn

#### Yale Journal on Reg.

 CFPB Survives Another Separation of Powers Challenge, But Agency Isn't Yet in the Clear, William Yeatman

#### American Action Forum

 June Starts Off in the Cost Column, Dan Goldbeck & Dan Bosch

#### ACS

 Rethinking Admin Law From APA to Z, Multiple authors Trump orders agencies to streamline biotech regulations, Greenwire

#### **Financial Markets & Housing**

Rewrite of Bank Rules Advances Slowly, Frustrating Republicans, Wall Street Journal

S.E.C. Tells Brokers to Work for You, but Don't Skip the Fine Print, New York Times

#### **Energy & Environment**

EPA sends draft methane rule to Trump, Greenwire

EPA may spin off disputed changes in Clean Power Plan redo, Greenwire

EPA issues guidance critics say would limit state's authorities over pipeline projects, *The Hill* 

Science Advisory Board to review clean cars rollback, Climatewire

#### **Health & Safety**

Supreme Court will not hear case on gun silencer regulations, AP

<u>USDA plans to scale back regulation of genetically modified</u> plants, *UPI* 

Judges scrap Trump safety check change, E&E News

#### **Business**

<u>Tech Giants Google, Facebook and Amazon Intensify Antitrust</u>
<u>Debate</u>, *Wall Street Journal* 

Trump's Trustbusters Bring Microsoft Lessons to Big Tech Fight, Bloomberg

As Calls For Regulation Get Louder, Could The 'Techlash' Go Too Far?, WBUR

Regulators warn e-cigarette companies over influencer posts that failed to disclose nicotine risk, Washington Post

#### **Technology**

<u>Crypto Exchanges Are Facing Their Biggest Regulatory Hurdle</u> Yet, *Bloomberg* 

Maine shakes up debate with tough internet privacy law, The Hill

California 'anti-eavesdropping' bill seeks to regulate smart speakers, USA Today

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#### AEI

 Why Washington's war on Big Tech will fizzle, James Pethokoukis

#### **Bipartisan Policy Center**

 Évidence Works, Cases Where Evidence Meaningfully Informed Policy, Nick Hart & Meron Yohannes

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May 22, 2010 Vol. 8 No. 20

Guest edited by Julie Balla & the RSC Team Tweet @RegStudies . Like us on Facebook Subscribe

#### Marketplace of Ideas

#### **GW Regulatory Studies** Center

- 2019 Spring Unified Agenda, Daniel Pérez
- Proposed Revisions to DOE's Process Rule Include Beneficial Changes and Areas for Improvement, Mark Febrizio

#### AEI

- Antitrust shouldn't be personal or political, Mark Jamison
- Calling out the Christchurch call, Bronwyn
- Congress should force the medical-industrial complex to end <u>surprise bills</u>, James C. Capretta
- White House and Commerce Department put China's tech sector on notice, Roslyn Layton

#### Brookings Institution

- Tracking deregulation in the Trump era. Updated May 16, 2019
- India 2024 Policy priorities for the new government, Shamika Ravi

#### Editor's Note

The Regulation Digest will be on vacation next week with some of the Regulatory Studies Center team. The Digest will resume on June 5th. See you then!

<-- Make sure you read Daniel's commentary on the just released Unified Agenda!

#### Regulation Digest

#### **Feature Story**

#### Consistency and Transparency in EPA Rulemaking

The Environmental Protection Agency released a memo titled, "Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process," which seeks to standardize how the agency measures the benefits and costs of its regulations.

See related public interest comments from Susan **Dudley**, **Joseph Cordes**, and **Brian Mannix**.

#### **Agency Rulemaking**

#### The Control of Hazardous Energy

The Occupational Safety and Health Administration published a request for information to help the agency determine what action, if any, it should take to modernize its control of hazardous energy

#### Cato Institute

 Government Should Keep Its Hands Off Our Tofu Sausages!, Simon Lester & Inu Manak

#### CAP

 Tailoring Banking Regulations to Accelerate the Next Crisis, Gregg Gelzinis

#### **CPR**

 Here's How OSHA Can Improve Its Handling of OSH Act Whistleblower Cases, Katie Tracy
 The 2019 Chesapeake Bay WIPs Evaluation of the 2019 Watershed Implementation Plans, Evan Isaacson & David Flores

#### CEI

- Regulatory Costs of Blurring Corporate and Government Roles, Clyde Wayne Crews
- Focus Ride-Hailing Policy on Consumer Benefits, Not Protecting Competitors.
   Marc Scribner
- Costs of Antitrust
   Regulation and
   Institutionalization of
   Raising Competitors' Costs,
   Clyde Wayne Crews

#### **Federalist Society**

- Baldwin v. U.S.: Will the Chevron Doctrine Be Refined or Overruled?, Robert T. Carney
- An Unprecedented Conflict Between the FTC & DOJ at the Intersection of Antitrust & Patent Law, Adam Mossoff

#### Free State Foundation

 State Net Neutrality
 Mandates and the Dormant Commerce Clause. Some Preliminary Thoughts, Daniel A. Lyons

#### GAO

2019 Annual Report
 Additional Opportunities to
 Reduce Fragmentation,
 Overlap, and Duplication

(Lockout/Tagout) standard to reduce regulatory burdens while maintaining or improving worker safety. Comments due August 19.

#### Registered Derivatives Clearing Organizations

The Commodity Futures Trading Commission issued a proposed rule to amend its regulations applicable to derivatives clearing organizations. The agency intends to enhance risk management and reporting obligations, clarify the meaning of certain provisions, simplify registration and reporting processes, and codify existing relief and guidance. The proposal is part of the Commission's review of its regulations and practices to make them simpler, less burdensome, and less costly. Comments due July 15.

#### **Test Procedures for Compressors**

The Department of Energy published a notice seeking public comment on whether the agency should proceed with a petition to allow compressor manufacturers to use a consensus industry test method in addition to the agency's own test procedure for determining energy efficiency compliance. According to the petition, the requirement to use the agency's test procedure can create duplicative testing resulting in additional cost to industry. Comments due August 15.

#### **Debt Collection Practices**

The Consumer Financial Protection Bureau issued a proposed rule to amend Regulation F to prescribe Federal rules governing the activities of debt collectors. The agency is proposing additional disclosure-related and record retention requirements for debt collectors covered under the Fair Debt Collection Practices Act in addition to other changes to debt collection communications and related practices. Comments due August 19.

#### Assistance for Low-Income Veteran Families

The Department of Veterans Affairs issued a proposal to amend regulations that govern the Supportive Services for Veteran Families Program. The agency states that the changes would enable grantees to augment available housing options for homeless veterans in high rent burden communities by increasing rental assistance for up to two years before recertification. Comments due June 17.

#### In Opinion

- The Herald Editorial Board: Editorial: Where the EPA Went Wrong on Water Quality
- Mary Kate Hopkins: Donald Trump's Regulation Cuts are Having an Effect
- Jeff Sovern: Congress is Considering Privacy Legislation Be
  Afraid
- Jon Hartsel & Peter St. Onge: <u>Canada's Free-Market</u> Example for the SEC

and Achieve Billions in Financial Benefits, May 21

Government Reorganization: Issues to Consider in the Proposed Reorganization of the Office of Personnel Management, May 21

#### Heritage Foundation

- A Regulatory Fix for the <u>Trucking Industry</u>, Nicolas Loris
- The Portable Certification of Spouses Act of 2019.
  Paul Larkin

#### Manhattan Institute

- The Perils of Fixing Outof-Network Health Care Prices, Chris Pope
- Energy & the Information Infrastructure: Robots Eat.
   Too, Mark P. Mills

#### **Mercatus Center**

- Safety Exemptions and the Regulatory Approach to Autonomous Vehicles, Brent Skorup & Jennifer Huddleston
- Economic Implications for the United States of a North America without NAFTA or USMCA, Christine McDaniel

#### **Public Citizen**

 Lost Safeguards. Popular Public Protections Repealed in the Trump Era, David Rosen, featuring an introduction by U.S. Rep. Hank Johnson (D-Ga.)

#### R Street Institute

- Comments to the Rhode Island Regulator, Travis Kavulla
- Public Safety, Jobs Depend on Statewide Rideshare Regulatory Framework, Marc Hyden

#### RFF

 Reducing Impacts of Food Loss & Waste, May 21

#### The Regulatory Review

 Strengthening Accountability for Aviation

- Former U.S. Rep. John Hostettler: Welcome Back,
   Federalism Dems Begin to Champion State's Rights
- Elaine Ou: Treat Facebook Like Big Tobacco
- Greg Wright: China-US Trade War Heats Up: 3 Reasons it Won't Cool Down Anytime Soon
- Harry Litman: The Justice Department Boosts Lethal Injection in a Big Way
- Seth Frotman: Let's Stop Treating Student Borrowers Like Second-Class Citizens
- Tara Lachapelle: The Market Needs to Be More Skeptical About T-Mobile-Sprint
- Kevin Kosar: Financial Collapse of the United States Postal Service is Coming
- James Broughel: New Rule Exposes the Regulatory Watchdog that Wasn't
- Thomas P. Vartanian: The Unintended Consequences of Interest Rate Caps

#### In the News

#### **Congress & Regulatory Reform**

Trump touts rule-axing record but slow to quantify benefits, E&E News

ICE gets CFTC nod for 'speed bump' on U.S. futures exchange, Reuters

<u>Use Scalpel Not Ax on Guidelines, Transportation Industries Say, Bloomberg</u>

#### **Financial Markets & Housing**

U.S. bank regulator will vet next Wells Fargo CEO, Reuters

Fingerprints and finances: next Wells Fargo CEO will be under regulatory microscope, Reuters

Payday Lenders Drum Up Customer Support to Ease Regulations, The Wall Street Journal

Inquiries Into Reckless Loans to Taxi Drivers Ordered by State Attorney General and Mayor, *The New York Times* 

#### **Energy & Environment**

EPA Plans to Rewrite Costs and Benefits of Anti-Pollution Rules, Bloomberg

<u>Trump's EPA shifts more environmental enforcement to states,</u> *The Washington Post* 

California utility in big 2015 gas leak had failed to probe leaks for decades, Reuters

<u>Utility, regulatory failures led to biggest US gas leak, The Washington Post</u>

States aren't waiting for the Trump administration on environmental protections, The Washington Post

EPA to implement change reducing number of predicted deaths from air pollution: report, *The Hill* 

E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math, *The New York Times* 

Safety, Sierra Blazer & Cary Coglianese

- The Uncertain Regulatory Future of Marijuana-Based Oil, Edward Hale
- Scrapping Electric Car Tax Credits, Scott Carson
- Should Pandora's Brain Be Regulated?, Jonathan D. Moreno

#### Washington Legal Fdn.

 WLF Urges High Court to Adopt Reasonable Limits on Clean Water Act Permitting Requirements, May 16

#### Yale Journal on Reg.

- Making Soup from a Single Oyster? CREW v. DOJ and the Obligation to Publish Office of Legal Counsel Opinions (Part II), Bernard Bell
- Soft Law Often Should be Permitted to Bind Agency Staff, Peter L. Strauss
- A Belated Contribution to the Symposium on Federal Agency Guidance and the Power to Bind, Richard J. Pierce, Jr.

#### American Action Forum

- <u>Drilling into Costs</u>, Dan Goldbeck & Dan Bosch
- Improving Drug Pricing Transparency & Lowering Prices for American Consumers, Douglas Holtz-Fakin
- The Drug Rebate Rule: What's the Budget Impact? Tara O'Neill Hayes

EPA mercury proposal faces harsh reception at House hearing, E&E News

#### **Health & Safety**

Airlines urge regulators not to compete on safety after Boeing crisis, Reuters

<u>Judge orders FDA to speed up review of e-cigarettes, The Washington Post</u>

#### **Business**

U.S. to mirror EU moves in scrutinizing derivatives clearers, Reuters

T-Mobile, Sprint Get Merger Backing From FCC Chairman, The Wall Street Journal

<u>Trump grants temporary reprieve from Huawei ban, Financial Times</u>

#### **Technology**

Facial-Recognition Startup Calls for Regulation Instead of Bans, The Wall Street Journal

Sandberg says breaking up Facebook wouldn't fix its problems, *The Hill* 

FCC delays review of spectrum assigned to vehicle communication, Reuters

U.S. Postal Service Starts Testing Self-Driving Trucks, The Wall Street Journal

Senate Commerce chair to renew push for regs on self-driving vehicles, *The Hill* 

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#### Marketplace of Ideas

## GW Regulatory Studies Center

- Improving Regulatory Benefit-Cost Analysis, Susan Dudley & Brian Mannix
- Panel Utility Competition Jerry Elliq

#### **Bipartisan Policy Center**

The Role of Real-World
 Evidence in Regulatory and
 Value-Based Payment Decisionmaking, Jan. 28

#### Brookings Institution

- Government shutdown halts the Trump FCC's deregulation agenda, Tom Wheeler
- Eliminating the anti-competitive effects of occupational licensing, Ryan Nunn

#### Cato Institute

- How 'Market Failure' Arguments Lead to Misguided Policy, Ryan Bourne
- Rregulation Magazine

#### Ctr. for Progressive Reform

#### **Feature Story**

27 Nobel Laureates, All 4 former Fed Chairs, and 15 Former Chairs of the Council of Economic Advisers 'Unite Behind Carbon Dividends as the Bipartisan Climate Solution'

The Climate Leadership Council's October 2018 report, "The Dividend Advantage," is making headlines as the Wall Street Journal ran an article, supportive op-ed, and negative column this past week which are listed here:

#### <u>Former Fed Leaders, Economists Rally Around Carbon Tax,</u> Timothy Puko

-- "The plan advocates replacing many environmental regulations with a simplified tax on businesses that release carbon into the atmosphere, an incentive for them to use cleaner energy. While economists have long supported carbon taxes as a climate-change solution, the new statement shows broad support for a political sweetener: sharing the proceeds with American consumers."

### <u>Economists' Statement on Carbon Dividends</u>, multiple authors

-- "Global climate change is a serious problem calling for immediate national action. Guided by sound economic principles, we are united in the following policy recommendations..."

 Regulatory Review in Anti-Regulatory Times, Congress, Daniel Farber

#### CEI

- What If Trump's Regulations
   Exceed His Regulatory Rollback
   Savings? Clyde Wayne Crews
- EPA's Wheeler Responds to Renewable Fuel Standard Questions, Ben Lieberman
- Agenda for the 116th Congress.
   Energy and Environment. Ben
   Lieberman
- This Week in Ridiculous Regulations, Ryan Young

#### **Federalist Society**

- EPA Reconsiders its Use of Co-Benefits in Cost-Benefit Analysis. Adam Gustafson
- FTC v. Qualcomm. Innovation & Competition. Geoffrey Manne

#### Free State Foundation

 Adopting Rebuttable Presumptions at the FCC, Randy May

#### Heritage Foundation

- Trump EPA Rejects Egregious Cost-Benefit Analysis of Controversial Rule, Daren Bakst
- <u>UK's Drone Debacle Has</u>
   <u>Lessons for the U.S.</u>, Jason Snead
   <u>& Jacob Paolillo</u>
- Tariffs Making Global Auto Market Uncertain Tori Whiting

#### Manhattan Institute

 The Supreme Court and the One-Way Regulatory Ratchet, James Copland

#### Mercatus Center

- American Spectrum Policy Should Allow More Compensation to Agencies for Clearing and More Geographic-Based Sharing, Brent Skorup
- Microsoft's Affordable Housing Plan Addresses a Government Failure, Salim Furth
- The Future of Micromobility
  May Require States to Rethink
  Old Laws, Jennifer Huddleston
  Skees

#### The Regulatory Review

<u>Big Names Bake a Climate Pie in the Sky</u>, Holman W. Jenkins, Jr.

-- "Finally, pardon a valedictory cynicism, but the most important truth about any political proposal is the part unsaid. Corporations rush to fund the carbon-dividend campaign not because they believe the plan is actionable, but because CEOs and PR departments need something gaudy to point to in order to suggest their concern about climate."

#### In Opinion

- Roslyn Layton: Will the STB Resist the Urge to Re-Regulate the Railroads?
- Editorial: Google Gets Caught in Europe's Privacy Trap
- Liza Zimmerman: <u>Supreme Court's Wine-Regulation</u>
   Case Focuses on Protectionism
- Veronique de Rugy: <u>Trump Paving the Road to Overtime</u> Pay With Good Intentions
- Corbin Barthold: The Judiciary Can Corral the
   Administrative State, but Only the People Themselves
   Can Tame It
- Mike Carr: The Mythology of Deregulation
- Marietje Schaake: Beware of Tech Companies Playing Government
- Tony Nitti: <u>IRS Publishes Final Guidance on the 20%</u>
   Pass-Through Deduction: Putting it All Together
- Alan Gassman: What to Ask Your Tax Advisors About the New Section 199A Regulations
- Noelle Acheson: Oceans Apart: Crypto Regulation in the US and EU
- Alfred Robinson: <a href="https://doi.org/ld/line-15-15">htts Official: OIRA has Received</a>
   Proposed Part 541 Overtime Regulations
- Tammy McCutchen: <u>Trump's DOL Should Stop</u>
   Protecting Bad Obama-Era Policy

#### In the News

#### Congress & Regulatory Reform

Trump's Deregulatory Agenda in Court, E&E News

<u>Shutdown Slows Momentum of Deregulation Efforts</u>, *Federal News Network* 

<u>Federal Register Eases Publishing Guide for Government Shutdown</u>, *Bloomberg* 

For Trump Administration, It Has Been Hard to Follow the Rules on Rules, New York Times

<u>House Dem to Offer Measure Backing Paris Climate Deal,</u> The Hill

IRS Releases Final Rules on Section 965 Repatriation Taxes, Accounting Today

#### **Financial Markets & Housing**

Wall Street Braces for MiFID-Style Rules Descending on the U.S., Bloomberg

- Regulatory Analysis and Decision-Making 2019 Executive Education Certificate Program, May 21-24
- Reforming Regulation to Promote Medical Use of Psychedelic Drugs, Sarah Madigan
- Once They Are Tested, Can Genes Stay Private? Erin Quick
- Adopting Rebuttable Presumptions at the FCC. Randy May
- Robots Are People
   Too Maybe Kate Mancuso
- <u>VVeek in Review,</u> Chen, Mancuso & Nakahara

#### Yale Journal on Regulation

- The Shutdown's Evolving Effects on Rulemaking, Bridget Dooling
- "Technology, Innovation, and Regulation" - A Call for Papers.
   Adam White
- Formalism v. Functionalism Redux, Richard Pierce
- Free Teleforum: A Supreme Court Case Challenge to Auer and Seminole Rock Deference, Aaron Nielson
- The Missing Legislative History of Azar v. Allina, John Cannan
- Announcing the Fourth Annual Administrative Law New Scholarship Roundtable, Miriam Seifter

#### **American Action Forum**

- Rulemaking Begins To Percolate, Dan Goldbeck
- France Fines Google, Doug Holtz-Fakin
- <u>Understanding The ADD Act</u>,
   Will Rinehart

#### AEI

- 7 virtues of data privacy 8 protection, Roslyn Layton
- Facing a future without Facebook 'likes' and 'shares'?.
   Bronwyn Howell

Wall Street Backlash Sinks Plan to Transform Swaps Market, Wall Street Journal

NY's Vullo on Bank Regulation, Bloomberg

The Hot New Job in Fintech: Someone to Deal With Regulators, *Bloomberg* 

#### **Energy & Environment**

4 Things to Watch this Year at DOE, E&E News

EPA Model for Measuring Rule Benefits May Inspire Other Agencies, Bloomberg

EPA Nominee Andrew Wheeler Pledges to Ease Burdensome Environmental Regulations, Wall Street Journal

EPA Keeps Certain Industry Toxics Standards Unchanged, E&E News

U.S. State Dept Says May Ask Trump to Scrap Another Obama Climate Order, *Reuters* 

<u>Critics Slam WOTUS Economics: 'In Theory, Pigs Could Fly', E&E News</u>

Andrew Wheeler, at E.P.A. Confirmation Hearing, Walks a Fine Line on Climate Change, New York Times

#### **Health & Safety**

Regulation Pushes Cannabidiol Treatments Into Mainstream, Newsmax

<u>Consumer-Safety Watchdog Sidelined by Government</u> Shutdown, *Wall Street Journal* 

Approvals of New Prescription Drugs at Risk in Shutdown, Wall Street Journal

FDA May Call Back Furloughed Staff for Food-Safety Checks, Bloomberg

#### **Business**

<u>Trump Administration Sets Final Rules for New Business Tax</u> <u>Deduction</u>, *Wall Street Journal* 

U.S. Regulators Have Met to Discuss Imposing a Record-Setting Fine Against Facebook for Privacy Violations, Washington Post

Google Fined \$57 Million in Biggest Penalty Yet Under New European Law, Wall Street Journal

Apple's Tim Cook Says Regulatory Action is Needed to Restore 'Full Faith' in Tech, *MarketWatch* 

<u>Privacy Problems Mount for Tech Giants</u>, Wall Street Journal

#### **Technology**

American Railways Chug Toward Automation, Wall Street Journal

The Coming Digitization of the Regulatory Environment, NextGov

<u>FAA/UAS - Drone Regulation Marches Forward!</u>, *JD Supra*<u>Court rejects FCC request to delay net neutrality case</u>, *The*<u>Hill</u>

If Google and LG Like Smart TVs, So Should the Privacy Police, *Bloomberg* 

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## Regulation Digest

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#### Marketplace of Ideas

#### **GW Regulatory Studies** Center

 Supreme Court to Hear Arguments on State Alcohol Protectionism This Month, Jerry

#### American Action Forum

- Regulation in The Age Of The Shutdown, Dan Goldbeck
- 2018: The Year in Regulation. Dan Bosch & Dan Goldbeck
- The 2018 Regulatory Record. Doug Holtz-Eakin
- Proposed International Pricing Index for Medicare Part B Drugs, Tara O'Neill Hayes

#### AEI

- The social cost of carbon. greenhouse gas policies, and politicized benefit/cost analysis, Benjamin Zycher
- Regulating artificial intelligence: Transparency and disclosure, Bronwyn Howell
- 3 myths about privacy in tech. Mark Jamison

#### **Bipartisan Policy Center**

#### Feature Story:

#### **Government Shutdown Affects Rulemaking**

Normally the Regulation Digest would be providing you with the most important final rules, proposed rules, and notices from federal agencies, but the government shutdown has left the Federal Register rather barren. Bridget Dooling and the rest of our team will be providing related insights during the shutdown.

#### Recent @RegStudies media citations:

- "Much of OIRA is furloughed because OMB is part of this shutdown...It's possible that agencies could provide additional time, but it's not guaranteed."
- "Bridget Dooling suggested the agency may be continuing to work on a subset of rules for agencies that remain funded or activities that are excepted during the shutdown. "But that it's on a case-by-case basis, because OIRA is subject to the funding lapse."
- "The federal government published fewer than 20 'economically significant' regulations in 2017, down from close to 100 in 2016 and the least since the beginning of the Reagan administration."

 Energy Innovation Fueling America's Economic Engine, Jan 17

#### **Brookings Institution**

- Enabling opportunities 5G, the internet of things, and communities of color, Nicol Turner Lee
- Will this new Congress be the one to pass data privacy legislation? Cameron Kerry
- Artificial intelligence and bias.
   Four key challenges, John
   Villasenor

#### Cato Institute

 Promoting Fintech Innovation and Consumer Choice: The Role of Regulatory Sandboxes, Jan. 17

#### Ctr. for American Progress

- The Risks in Betsy DeVos' Rethink of Higher Education.
   Antoinette Flores
- The Freedom to Leave. Karla Walter

#### Ctr. for Progress, Reform

- How Trump Officials Abuse Cost-Benefit Analysis to Attack Regulations, Daniel Farber
- The Year Ahead, Daniel Farber

#### CEI

- EPA Proposes Changes to Mercury Air Rule, Marlo Lewis, Jr.
- Year in Review 2018.
   Consumer Financial Protection.
   Daniel Press
- End of the Road for Net Neutrality Comeback Attempt, Jessica Melugin
- Trump's 2018 Deregulatory Effort: 3,367 Rules: 68,082 Pages: Clyde Wayne Crews
- This Week in Ridiculous Regulations, Ryan Young

#### **Federalist Society**

- Can and Should the Federal Judiciary Rein In Our Expansive Administrative State?, Ted Hirt
- What Should the FHFA's 2019 Agenda Be? Ed DeMarco & Alex Pollock

- "The slow pace in new #regulation is leading to the business confidence that we have seen in the US. Executives are no longer worried about what is coming next."

#### In Opinion

- Cass Sunstein: <u>Trump's Wall Fails Trump's Test for New</u>
  Regulations
- Crispin Sartwell: What's Worse Than Facebook?
- Tyler Cowen: Why Internet Censorship Doesn't Work and Never Will
- Yuval Levin: 'Judicial Fortitude' Review: Time for Congress to Do Its Job
- Brian Knight: <u>States must rework their arguments against</u>
  OCC fintech charters
- James Broughel: <u>The Problem with 'Expert' Regulation</u>
- Wayne Crews & Ryan Young: Reining in Regulatory Dark
  Matter
- Joseph Vasapoli: Fight Climate Change By Freeing the Electric Consumer
- Howard Homonoff: How Democrats' Control of the House
   Could Impact Media Regulation In 2019
- Marlo Lewis: <u>Trump's EPA to Repeal Another Obama-Era Anti-Coal Regulation</u>
- Chris Koopman: Lessons to Take From Drones Shutting
   Down Gatwick Airport
- Steven Hill: How to rein in Big Tech
- Jeanne Lenzer & Shannon Brownlee: The FDA is Still Letting Doctors Implant Untested Devices Into Our Bodies
- Wayne Crews: Working Together, We Can Keep Country People Off the Internet (Just Kidding; Jumpstart 5G This Way)
- Michael Mikulka: <u>Benefits of Limiting Toxins Obviously</u>
   Outweigh Cost Except at Trump's EPA
- Kirsten Wegner: Market Volatility Ensures a Larger Role for FinTech in 2019
- Jennifer Liss Ohayon & Leif Fredrickson: Newly Empowered Democrats Need to Save the EPA - Again
- WSJ Editorial: Fighting a Tort Plague

#### In the News

#### **Congress & Regulatory Reform**

Rulemaking Goes Dark During Shutdown Over Spending Standoff, Bloomberg

OIRA still reviewing some regs during shutdown, E&E News

<u>Trump administration considers rollback of anti-</u>discrimination rules, *Washington Post* 

2019 Outlook: Four Things About Trump's Push to Deregulate, Bloomberg

 Panel: Social Media and Freedom of Speech

#### Free State Foundation

 The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulation, Randy May

#### GAO

 Dodd-Frank Regulations: CFPB Needs a Systematic Process to Prioritize Consumer Risks

#### Heritage Foundation

 DOL Rule to Expand Multiple Employer Plans. A Positive Step, But Broader Savings Options Needed. Romina Boccia

#### Inst. for Policy Integrity

 Supplemental Comments to NHTSA and EPA on Vehicle Emissions Standards, Multiple authors

#### Mercatus Center

- The Effect of Regulation on Low-Income Households, several authors
- Podcast: The Future of Local. State, and Federal Regulations in 2019
- Innovation Arbitrage and Export Controls, Adam Thierer
- The Case for a Technological Golden Rule, Jennifer Huddleston Skees

#### R Street Institute

California's Work Rules
 Sabotage the Gig Economy
 Steven Greenhut

#### The Regulatory Review

- Make Benefit-Cost Analysis
   Meaningful, James Broughel
- Regulatory Analysis
- and Decision-Making, May 21-24
- How Regulators Can Increase Price Competition in Health Care, Sophie Beutel
- <u>Changes to Universities</u>
   <u>Sexual Assault Tribunals May</u>
   <u>Be Here to Stay KC Johnson</u>

Trump asks Supreme Court to resolve groundwater fight, *E&E News* 

#### **Financial Markets & Housing**

Meet the Watchdog Called CryptoMom, Wall Street Journal

Fed Nominee Nellie Liang Withdraws From Consideration, New York Times

#### **Energy & Environment**

<u>Utilities Speed Up Closure of Coal-Fired Power</u> Plants, *Wall Street Journal* 

U.S. limits on coal plant mercury emissions too costly: Trump's EPA, Reuters

Trump nominates Wheeler for top job at agency, E&E News

<u>Trump administration presses ahead with Alaskan drilling plan despite shutdown, The Hill</u>

U.S. Carbon Emissions Surged in 2018 Even as Coal Plants Closed, New York Times

#### **Health & Safety**

Counterdrone Technologies Face Slow Ramp-Up at Airports Globally, Wall Street Journal

EPA moves to ban toxic paint-stripper chemical for some - but not all - uses, Washington Post

How Many Lives EPA Rules Save Comes Down to the Counting, Bloomberg

#### **Business**

Introduction of business rules slows sharply under Trump, Financial Times

<u>Judge Blocks Airbnb Crackdown in New York City,</u> Wall Street Journal

#### **Education**

DeVos moves to boost college online learning while reducing regulatory oversight, Washington Post

#### **Technology**

FAA Launches Test Program to Speed Up Drone Identification Rules, Wall Street Journal

These are the 2019 court fights that will decide the future of net neutrality, *Washington Post* 

Good Privacy Requires Tech, Cultural Change, Wall Street Journal

Winklevosses' Cryptocurrency Exchange Says the 'Revolution Needs Rules', Wall Street Journal

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SCOTUSblog Argument
 Preview Azar v Allina Health
 Services, Bridget Dooling

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#### Marketplace of Ideas

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Reg Stats, Charts

#### Reason

- NY's Liquor Authority Wants
   Uber Eats to Get a Liquor
   License, Christian Britschgi
- The New Trustbusters Are Coming for Big Tech, Thomas Hazlett
- No More Cookies for Children', Billy Binion
- Mississippi Retreats on Stupid Attempts to Censor 'Veggie Burger' Labels, Scott Shackford
- Michigan Governor's Reckless E-Cigarette Ban, Jacob Sullum
- Pointless CBD Bans Are Spreading Like, Well, CBD, Baylen Linnekin

#### RFF

 How Well Are Our Environmental Laws Working?, Sept 16 **Editor's Note**: <u>GW Remembers September 11th</u> -- Join members of the GW community in honoring the memory of the nine GW alumni who died in the September 11th tragedy, as well as all of those who lost their lives that day in the attacks on the World Trade Center. -- 7:00 PM, Kogan Plaza.

#### Regulation Digest

#### **Agency Rulemaking Highlights**

#### Asylum Processing

Citizenship & Immigration Services issued a notice of proposed rulemaking to remove a provision requiring USCIS to grant or deny an asylum application's initial employment authorization (EAD) application within 30 days. Comments due November 8.

#### Incandescent Light Bulbs

The Dept. of Energy issued a final rule withdrawing energy conservation standards for incandescent light bulbs which were issued under the Obama administration on January 19, 2017. Effective October 7.

The department also issued a notice of proposed

The Future of Carbon Pricing.
Examining 2019's New
Proposals Sept 20

#### The Regulatory Review

- Are Regulatory Agreements to Address Climate Change Anticompetitive? Herbert Hovenkamp
- Week in Review, Update

#### Urban Institute

 HUD's Proposal to Revise the Disparate Impact Standard Will Impede Efforts to Close the Homeownership Gap, Michelle Aronowitz & Edward Golding

#### Washington Legal Fdn.

 Big Tech' Review Provides DOJ an Opportunity to Reinforce Antitrust Principles, Anthony Swisher

#### Yale JREG

Kisor's Coming Out Party.
 William Yeatman

#### American Action Forum

- Lightbulb Rule Shines Down on Slow Week, Dan Goldbeck & Dan Bosch
- Treasury and HUD Release Sweeping Blueprint for Comprehensive Housing Finance Reform, Thomas Wade

#### AEI

- Uncompensated Care and the Collapse of Hospital Payment Regulation, Jeffrey Clemens & Benedic Ippolito
- Hey world. Do not ban ecigarettes. Alex Brill
- Victims of regulation. Video
- The states vs. Google, James Pethokoukis
- Is it time to change how we regulate the internet? Podcast

#### **Brookings Institution**

- How states can improve America's immigration system, John Hudak & Christine Stenglein
- How to fix America's housing policies, Jenny Schuetz
- Considerations for expanding international reference pricing beyond Medicare Part B, Loren Adler, et al.

<u>determination</u> that previous standards do not need to be amended. Comments due November 4.

#### Infant Bouncer Seats

The Consumer Product Safety Commission issued a direct final rule incorporating ASTM voluntary standard requirements for infant bouncer seats. Comments due October 7.

#### NIST Privacy Framework

The National Institute of Standards & Technology issued a notice to publish a "Preliminary Draft of the NIST Privacy Framework: A Tool for Improving Privacy through Enterprise Risk Management." NIST will host a webinar on September 17. Comments due October 24.

\*\*\*Read Daniel Pérez's public interest comment: NTIA's Approach to Consumer Privacy\*\*\*

#### Marine Diesel Engines

The Environmental Protection Agency issued a proposed rule to allow additional time for certain high-speed commercial vessels to install certified Tier 4 marine diesel engines, and to streamline certification requirements in engine development. Comments due October 21.

#### Healthcare Enrollment

The Centers for Medicare & Medicaid Services issued a final rule with comment period implementing Medicare, Medicaid, and Children's Health Insurance Program providers and suppliers to disclose affiliations with other providers and suppliers. The rule also provides CMS with additional authority to deny or revoke a provider's or supplier's Medicare enrollment. Effective November 4.

#### In Opinion

- Fred Krupp: Car Companies Want Stricter Emissions Standards. What's the Problem?
- Greg Ip: How to Get Rid of Carbon Emissions: Pay Farmers to Bury Them
- Jody Freeman: The Auto Rule Rollback That Nobody Wants, Except Trump
- WSJ Editorial: Long Live the Incandescent Bulb
- Paul Krugman: Trumpism Is Bad for Business
- NYT Editorial: We Still Don't Know How Safe Vaping Is
- Chelsea Boyd: <u>Tobacco Harm Reduction</u>: <u>Applying the Evidence to Policy</u>
- Scott Gottlieb: E-cigarettes Are Not Off the Hook
- Paul LePage: NOAA's Plan to Save the Whales Has Maine Lobstermen Boiling
- Adam Minter: It's Time to Regulate Outer Space
- Henry Miller: We Need A Regulatory Reformer to Head the FDA

- How will a national data privacy law affect connected devices, applications, and the cloud?, Sept. 16
- C. Boyden Gray Center
- The Administrative State Goes to Court, Sept. 12
- The Future of White House Regulatory Oversight and Cost-Benefit Analysis, Sept. 13
- Cost-Benefit Analysis Working Papers, Update

#### Cato Institute

- Looming Doctor Shortage Demands Innovative Solutions, Jeffrey Singer
- Michigan Bans Flavored E-Cigarettes, Jeffrey Miron & Erin Partin

#### CAP

- The Modern Company Town, Zoe Willingham & Olugbenga Aillore
- The Trump administration plans to gut food stamps, hitting red states hardest, Alan Puke

#### CPR

 Cost-Benefit Analysis and the Next President, Daniel Farber
 Trump's Legal Challenges to the California Car Deal, Daniel Farber

#### CEI

- Unknown Societal Costs of Imposing Regulation Based on Secret (or Creatively Leveraged) Data, Wayne Crews
- Trump Administration Pushes Back on California's Fuel Economy Scheming, Marlo Lewis
- State Attorneys General
   Launch Antitrust Investigations,
   Forget 'Relevant Market'
   Fallacy, Ryan Young
- Department of Energy
  Expands Consumer Choice in
  Light Bulbs, Ben Lieberman
- This Week in Ridiculous Regulations, Ryan Young

#### **Federalist Society**

• <u>The New Endangered</u> <u>Species Act Regulations</u>. Podcast

- James Freeman: How Much Would It Cost to Fire Trump?
- Matt Mackowiak: FDA Regulations On E-cigarettes an Exercise in Crony Capitalism
- Brad Smith & Carol Ann Browne: <u>Tech Firms Need More</u> Regulation
- David Hayes: <u>Trump Administration is Testing Corporate</u> Environmental Resolve
- Susan Matthews: Everything is Endangered
- Amy Sinden: <u>Trump's Deregulatory Zeal Goes Beyond</u>
   Even Where Industry Asks Him to Go
- Tyler Bishop: <u>Advertisers and Publishers Must Work</u>
   Together to Overcome Privacy Regulation Challenges
- Matt Anderson: It's Time To Re-regulate Airlines
- Steven Greenhut: Worker-rights Nill Does No Favors for Drivers or Consumers
- Lauren Willis: <u>CPFB Head Misguided In Reliance on</u> Consumer Education
- John Maa & Jeffrey Wigand: San Francisco Banning Ecigarettes is a Model for the Nation
- Thomas McGarity: Another Trump Rollback That Will Harm Texans
- Douglas Schoen: <u>States Move On Issues as Federal</u> Government Remains Gridlocked
- Ruth Ellen Wasem: Report On Migrant Children
   Documents the Painfully Obvious

#### In the News

#### Congress & Regulatory Reform

New Google and Facebook Inquiries Show Big Tech Scrutiny Is Rare Bipartisan Act, Wall Street Journal

Some industries see Trump's rule killing going too far, Greenwire

Politicians Race to Claim Their Piece of the Techlash, Bloomberg

Sen. Cardin moves to block ACE rule, Greenwire

#### **Financial Markets & Housing**

Banks Want Reassurance on Payday-Type Loans, Wall Street Journal

CFPB moves to ease fintechs' regulatory fears, American Banker

U.S. SEC proposes additional transparency requirements on self-regulatory organizations, quarterly reports, *Reuters* 

When New Investor-Protection Rules Come Up Short, States Step In, Wall Street Journal

Technology Is Banks' New Battleground, Wall Street Journal

#### **Energy & Environment**

<u>Justice Dept. Investigates California Emissions Pact That</u> Embarrassed Trump, *New York Times* 

In a twist, Colorado asks EPA to lower state's air rating, Associated Press

Keep an eye out for 7 highly anticipated rules, Greenwire

EPA slaps failure finding on 2 states, E&E News

 DoD's Supply Chain in the Crosshairs, Podcast

#### Free State Foundation

 Progressivism and the Beginnings of the True Administrative State Joe Postell

#### GAO

Date Labels on Packaged
 Food, Report

#### Heritage Foundation

- It's Lights Out for Obarna-Era Bulb Ban, Nicolas Loris
- The Nuclear Energy Leadership Act, Katie Tubb

#### **Hoover Institution**

- The Ability Of Markets, Richard Epstein
- California On Verge Of Passing Enormous Job-Killing Bill, Lee Ohanian

#### Inst. for Policy Integrity

 Petition to NHTSA for Reconsideration of Fuel Economy Penalties, Sylwia Bialek, et al.

#### Mercatus Center

- The Worst Regulation Ever Proposed, Adam Thierer
- Beware Calls for Government to "Save the Press", Adam Thierer & Andrea O'Sullivan

#### **NBER**

- On the Redesign of Accident Liability for the World of Autonomous Vehicles, Steven Shavell
- How Do Private Digital
  Currencies Affect Government
  Policy? Max Raskin, Fahad
  Saleh, & David Yermack

#### **Public Citizen**

- Anti-Labor Day, Matt Kent
- Automaker Antitrust Investigation is Trumpian Revenge, Robert Weissman
- FDA's Double Denial Concerning Its Delinquency in Urgently Implementing Better Opioid Regulation, Sidney Wolfe

Conservatives, coal groups fight Trump carbon rule in court, Energywire

Wheeler: No final decision on splitting rollback, Greenwire

<u>Citing climate risks, EPA unveils plan for recycling, reuse.</u> *Greenwire* 

Trump rolls back regulations on energy-saving lightbulbs, CNBC

EPA Wants to Revoke California Auto Regulation Powers, Bloomberg

#### **Health & Safety**

Trump Administration Considering Ban on Nontobacco-Flavored Vaping Products, Wall Street Journal

<u>Federal Watchdog Warns EPA Is Failing To Enforce Lead</u> Paint Abatement Rules, *NPR* 

<u>Juul Violated Federal Rules by Marketing Vaping Products as Safer Than Cigarettes, F.D.A. Says</u>, New York Times

Vaping Health Scare Prompts Slew Of Proposed Regulations From NY Lawmakers, WLNY

FDA Adopts Units of Measure Standard for Regulatory Submissions, Regulatory Focus

#### **Business**

California Passes Landmark Bill Requiring Contract Workers to Be Labeled as Employees, Wall Street Journal

How Top-Valued Microsoft Has Avoided the Big Tech Backlash, New York Times

Businesses Across the Board Scramble to Comply With California Data-Privacy Law, Wall Street Journal

51 major CEOs ask Congress for federal privacy law blocking state rules, The Hill

Amazon Probed by U.S. Antitrust Officials Over Marketplace, Bloomberg

Fed's Powell Says Facebook's Libra Digital Coin Needs 'Highest' Regulatory Rules, The Street

#### **Technology**

Europe's Tougher Approach to Big Tech, Wall Street Journal Regulator Weighs Disclosing Names of Utilities That Violate Grid Security Rules, Wall Street Journal

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From: woods.clint@epa.gov [woods.clint@epa.gov]

**Sent**: 4/11/2019 6:38:01 PM

To: Idsal, Anne [idsal.anne@epa.gov]; Harlow, David [harlow.david@epa.gov]

Subject: Fwd: Draft Cost-Benefit Memo

Attachments: DRAFT Cost Benefit Memo 04.11.19.docx; ATT00001.htm

#### Begin forwarded message:

From: "Bolen, Brittany" < bolen.brittany@epa.gov>

Date: April 11, 2019 at 11:21:23 AM EDT

To: "Wehrum, Bill" <<u>Wehrum.Bill@epa.gov</u>>, "Woods, Clint" <<u>woods.clint@epa.gov</u>>, "Dunn, Alexandra" <<u>dunn.alexandra@epa.gov</u>>, "Beck, Nancy" <<u>Beck.Nancy@epa.gov</u>>, "Wright, Peter" <<u>wright.peter@epa.gov</u>>, "Cook, Steven" <<u>cook.steven@epa.gov</u>>, "Ross, David P" <<u>ross.davidp@epa.gov</u>>, "McDonough, Owen" <<u>mcdonough.owen@epa.gov</u>>

Cc: "Leopold, Matt (OGC)" < Leopold.Matt@epa.gov >, "Schwab, Justin" < Schwab.Justin@epa.gov >, "Jones, Lindsey" < jones.lindsey@epa.gov >, "Lovell, Will (William)" < lovell.william@epa.gov >, "Jackson, Ryan" < jackson.ryan@epa.gov >, "Molina, Michael" < molina.michael@epa.gov >

Cubinate Dunck Coat Day of the Beauty

**Subject: Draft Cost-Benefit Memo** 

#### Colleagues,

Thanks again for taking time to meet with me, along with the OP/OGC team, on the Administrator's cost-benefit reform effort. As discussed at last week's AA meeting, the Administrator is interested in sending a memorandum that lays out next steps. Please let me know if you have any feedback on the draft memorandum attached by **COB Wednesday** (April 17).

Best, Brittany

From: woods.clint@epa.gov [woods.clint@epa.gov]

**Sent**: 8/28/2019 7:57:23 PM

To: Harlow, David [harlow.david@epa.gov]

**Subject**: Fwd: FOR REVIEW: OAR 2019 Fall Reg Plan Edits

Attachments: OAR-2019 Fall Reg Plan Edits-Final.docx; ATT00001.htm; Reg Plan Fall 2019\_OAR Edits.docx; ATT00002.htm

#### Begin forwarded message:

From: "Campbell, Ann" < <u>Campbell.Ann@epa.gov</u>>

**Date:** August 28, 2019 at 1:05:12 PM EDT **To:** "Woods, Clint" < woods.clint@epa.gov>

Subject: FOR REVIEW: OAR 2019 Fall Reg Plan Edits

Clint, attached please find OMB's comments back to EPA on the Reg Plan and OAR's proposed responses. The comments are due COB today to OP.

The Air Program text can be found on pages 2-5, 10-12, and 14-37.

The Reg Agenda edits are still being compiled and so I do not have all those edits yet; those are due tomorrow to OP.

Please let me know if you approve these moving forward. Thank you.

Ann Campbell Chief of Staff EPA/Office of Air and Radiation

Office: 202 566 1370

From: Farrar, Wanda <farrar.wanda@epa.gov>
Sent: Wednesday, August 28, 2019 11:12 AM
To: Campbell, Ann <Campbell.Ann@epa.gov>
Cc: Morgan, Ruthw <morgan.ruthw@epa.gov>

Subject: OAR 2019 Fall Reg Plan Edits

Good Day Ann,

Attached are the OAR program's edits to the 2019 Fall Reg Plan. The comments are due COB today to OP. Please direct questions re: the edits to Ruth Morgan for OAQPS and Jessie Mroz for OTAQ. Upon completion of final review, please send to Caryn Muellerleile in OP and cc: me. I will provide the Reg Agenda edits ASAP which are due COB tomorrow (Thursday, August 29, 2019).

Thank you, Wanda

From: Broome, Shannon S. [SBroome@hunton.com]

10/1/2018 8:12:44 PM Sent:

To: dpettit@nrdc.org; Brightbill, Jonathan (ENRD) [Jonathan.Brightbill@usdoj.gov]; Woods, Clint [woods.clint@epa.gov]

CC: Ellis, Clare [CEllis@hunton.com]

Subject: RE: Draft Paper and Next Call -- ABA Fall Conference - CLE Materials - Deregulation in Focus - The CAA and the

States 70899299 1.DOCX

Attachments: 2018-09-30 FINAL Dereg in Focus Panel Paper ABA Fall Conference-c.docx

All – here is the final paper. I just submitted it. Thanks for all of the support in getting this done.

Best Regards,



#### Shannon S. Broome

Partner/Office Managing Partner San Francisco sbroome@HuntonAK.com 415.975.3718 202.955.1912 m 415.818.2275

bio | vCard |

Hunton Andrews Kurth LLP 50 California Street Suite 1700

San Francisco, CA 94111

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From: Broome, Shannon S.

Sent: Monday, September 24, 2018 12:10 AM

To: dpettit@nrdc.org; Brightbill, Jonathan (ENRD); 'Woods, Clint'

Cc: Ellis, Clare

Subject: Draft Paper and Next Call -- ABA Fall Conference - CLE Materials - Deregulation in Focus - The CAA and

the States\_70899299\_1.DOCX

All -

Thank you again for agreeing to present on the "Deregulation in Focus" panel at the SEER Fall Conference in San Diego. As promised, we put together some background materials on a few regulations that could be good fodder for discussion of state roles. The attached is intended to provide "table setting" information about some rules we could discuss. It is not intended to discuss the appropriate role of states – that is for the panel discussion. We tried to be neutral – a Dragnet "just the facts" approach on these regulations. Our final paper is due on Friday.

Please keep in mind that the purpose of this paper is to ensure that the various states where ABA members are licensed grant CLE credit. We are not trying to win "best paper" (unless one of you really wants to do that). So please recognize the spirit with which the attached was prepared before criticizing. It's okay to criticize and

make edits; we were gearing level of effort to the goal and were not trying to carry anyone's bags. I am copying Clare Ellis who was kind enough to help with the paper (thank you Clare!).

#### **Next Steps for Our Panel:**

- 1. Finalize the paper and submit it: Please review the attached and provide any comments/edits by Wednesday COB. Please read the footnote that I put on the first page saying we all contributed but that the paper doesn't represent our organizations' positions so we can't have it cited back to us in case we inadvertently said something that hurts someone's position.
- **2.** Circulate assignments for the panel and format with moderator questions for review by this group: I intend to circulate the outline of the panel that we have discussed with time allocations by October 10.
- 3. Hold a conference call to review and finalize the outline/questions: I propose that we have a conference call to go over the approach to the panel with the draft moderator questions the week of October 15. I am hoping that can work for everyone. Please fill out the doodle poll a this link re your availability that week: https://doodle.com/poll/dzgtcmawk4hamnst
- **4.** Briefly meet the day before our panel (Thursday) to do any last-minute logistics and have a quick drink or coffee so that we are familiar and comfortable. This is obviously optional but I find that the panels go better if we have at least had one in-person interaction before stepping up on the stage. Please let me know if you could break away on Thursday between 4 and 5 to meet in San Diego and do this.

Best Regards,



#### Shannon S. Broome

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# American Bar Association Section on Environment, Energy, and Resources Fall Conference 2018 San Diego, California

Panel Paper: Deregulation in Focus: The Clean Air Act and States<sup>1</sup>

#### October 19, 2018

**Abstract:** This paper provides background information on recent regulatory reform efforts of the Trump Administration as background for the panel discussion that will be held on October 19, 2018. Our panel includes speakers from a range of stakeholder groups and the case studies below provide the historical information that brings audience members up to date on the regulatory and legal history that will be the departure point for the discussion.

Elections have consequences. That's true regardless of the party that is currently sitting in the White House or which party holds a majority in the Senate or House of Representatives. Since the 2016 election, as with all national elections where a shift in the party of the president occurs, steps are taken by the new administration to evaluate the policies and regulations of the prior administration and to make adjustments that the new president deems appropriate. This panel focuses on steps that the current administration undertook in this regard with respect to the Clean Air Act (CAA), with additional focus on how the states have reacted. The purpose of this paper, which was jointly prepared by all panelists, is to provide background on some of the regulations that have been addressed by the Trump Administration to facilitate a productive discussion.

A number of CAA regulatory programs have been implicated in the efforts of the Trump Administration to evaluate President Obama's regulatory programs and determine if changes are appropriate. While President Trump ran on a platform that promoted jobs and business, his campaign speeches also supported clean air and clean water.<sup>2</sup> Since President Trump took office, EPA has worked to review the actions of the prior administration, with particular focus on actions taken shortly before the presidential transition. As a result, EPA has issued proposals to revise, and in some cases rescind, regulations for some programs. Under the CAA, we focus below on: the background of

<sup>&</sup>lt;sup>1</sup> The following panelists contributed to this paper: Jonathan D. Brightbill, Shannon S. Broome, David Pettit, Clint Woods. The characterization of any particular position is not to be attributed to a particular author or the author's employer. Nothing in this paper necessarily reflects the views of the Department of Justice, the Environmental Protection Agency, or any federal agency.

<sup>&</sup>lt;sup>2</sup> The allocation of resources at the EPA is not entirely within any administration's control—statutes impose mandatory duties that require the agency to issue certain regulations according to specified schedules. In the case of the CAA Amendments of 1990, Congress specified many deadlines, and since that time, EPA has tried to meet those deadlines, but issuing such regulations often requires extensive and complex analyses (e.g., residual risk analyses for sources of hazardous air pollutants). As a result of the backlog, some of those regulations are now subject to court-ordered deadlines, which can affect EPA's allocation of its resources.

the Clean Power Plan (CPP), which has been proposed to be replaced by the Affordable Clean Energy (ACE) regulation; the January 2017 Amendments to the CAA Section 112 Risk Management Program (RMP) regulations, which have been proposed to be revised; the EPA greenhouse gas (GHG) standards with respect to state authority under the CAA to regulate vehicle GHGs for motor vehicles and light trucks; and the National Ambient Air Quality Standards (NAAQS) program, where EPA is evaluating the ozone NAAQS which was already in litigation when the presidential transition occurred and remains in effect while decisions are made regarding its status.

#### **EXECUTIVE INITIATIVES ON REGULATION**

Soon after taking office in the beginning of 2017, President Trump issued a number of Executive Orders and Presidential Memoranda aimed at regulatory reform, cooperative federalism, aiding domestic manufacturing and energy production, and supporting infrastructure development. These executive actions are briefly described as follows:

- 1. Presidential Memorandum, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing" (Jan. 24, 2017). This memorandum directs the executive branch to reduce burdens on manufacturing by streamlining permitting. It directs the Department of Commerce to conduct outreach and request public comment on the impact of federal regulations on domestic manufacturing, and to develop a permit streamlining action plan within 60 days after the close of the comment period and to submit it to the President identifying priority actions and recommended deadlines.
- 2. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs" (Jan. 30, 2017). This order requires agencies to identify two regulations for repeal upon each new significant regulatory proposal and to ensure that the total incremental cost of new regulation to be finalized in fiscal year 2017 is zero. In furtherance of this requirement, the order provides that any new incremental costs associated with new significant regulations shall be offset by the elimination of existing costs associated with at least two prior regulations.
- 3. Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017). This order creates a structure for identifying opportunities for regulatory reform in federal agencies. It requires agencies to appoint a Regulatory Reform Officer to implement regulatory reform initiatives, requires agencies to form a Regulatory Reform Task Force to evaluate existing regulations and, where appropriate, to make recommendations to the agency head regarding their repeal, replacement, or modification.
- 4. Executive Order 13781, "Comprehensive Plan for Reorganizing the Executive Branch" (Mar. 13, 2017). This order sets forth a plan to improve the efficiency, effectiveness, and accountability of federal agencies, including, as

appropriate, to eliminate or reorganize unnecessary or redundant federal agencies. It directs agencies to submit a proposed plan to OMB to reorganize each covered federal agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency. It also directs OMB to conduct outreach and request public comment on any proposed plan and to submit the proposed plan to the President.

- 5. Executive Order 13783, "Promoting Energy Independence and Economic Growth" (Mar. 28, 2017). This order directs the EPA Administrator to review the CPP, as well as related rules and Agency actions. It orders federal agencies to immediately review all agency actions that potentially burden the safe, efficient development of domestic energy resources. It orders the review of the estimates of the Social Cost of Carbon (SCC), Nitrous Oxide, and Methane for the purpose of Regulatory Impact Analyses. It also disbands the Interagency Working Group on the Social Cost of GHG and ordered the withdrawal of certain technical documents related to SCC. Finally, it rescinds certain prior energy and climaterelated Presidential executive orders, memos, and regulatory actions and orders a review of regulations related to U.S. oil and gas development.
- 6. Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 15, 2017). This order directs that there be "One Federal Decision" for "major infrastructure projects," whereby a single federal agency serves as the lead point of contact for all National Environments Policy Act (NEPA) for issuing a single Record of Decision (ROD) on behalf of all involved agencies. It also requires that authorization decisions for the construction of a major infrastructure project be completed within 90 days of the issuance of a ROD by the lead Federal agency in most circumstances, and "not more than an average of approximately 2 years" after issuance of the Notice of Intent (NOI) to prepare a NEPA Environmental Impact Statement (EIS) or "other benchmark deemed appropriate by the Director of OMB."
- 7. Executive Order 13795, "Implementing An America-First Offshore Energy Strategy" (Apr. 28, 2017). This order requires the Department of Commerce to review all designations and expansions of National Marine Sanctuaries and Marine National Monuments within the 10-year period prior to the date of the order. It requires the Department of the Interior and Commerce to review numerous rules and guidance pertaining to off-shore energy development for potential revisions or withdrawal.
- 8. Presidential Memorandum, "Promoting Domestic Manufacturing and Job Creation Policies and Procedures Relating to Implementation of Air Quality Standards" (Apr. 12, 2018). This memorandum directs the EPA Administrator to take specific actions to ensure efficient and cost-effective implementation of the NAAQS program, including with regard to permitting decisions for new and expanded facilities, and with respect to the Regional Haze

Program. These actions are intended to ensure that "EPA carries out its core missions of protecting the environment and improving air quality in accord with statutory requirements, while reducing unnecessary impediments to new manufacturing and business expansion essential for a growing economy."

#### CURRENT STATUS OF SELECTED EPA REGULATORY REFORM EFFORTS

EPA's regulatory reform actions following the above executive directives are summarized as follows:

#### 1. Clean Power Plan

On August 31, 2018, EPA published a proposed rule known as the Affordable Clean Energy or "ACE" rule, which is the Trump Administration's proposed replacement for the Obama Administration's CPP regulations. See EPA, Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations: Revisions to New Source Review Program; Proposed rule, 83 Fed. Reg. 44746 (Aug. 31, 2018).

The proposed ACE rule includes revised emission guidelines for the development, submittal, and implementation of state plans to reduce greenhouse gas (GHG) emissions from certain Electric Generating Units (EGUs). The notice states that the Agency is proposing to determine that heat rate improvement measures are the "best system of emission reduction" (BSER) for existing coal-fired EGUs. The notice also proposes new regulations for the implementation of emission guidelines that apply to this source category and any future emission guidelines issued, and proposes revisions to the New Source Review (NSR) permitting program to support the implementation of efficiency projects at EGUs. EPA is taking comments on the proposed ACE rule through October 30, 2018.

#### 2. Ozone NAAQS

EPA has stated that it is working to review and reform the NAAQS program consistent with the Administration's commitment to regulatory reform, cooperative federalism, and domestic manufacturing (as articulated under the April 2018 Executive Memorandum summarized above and in a "Back-to-Basics" memorandum issued by EPA in response in May 2018). These efforts include a focus on getting "back-to-basics" for NAAQS setting, designations, and implementation.

Such efforts have been implicated in the Agency's review and reconsideration of EPA's October 2015 rule that reduced the ozone NAAQS from 75 parts per billion (ppb) to 70 ppb. Although D.C. Circuit litigation over this decision was held in abeyance for a period of time after the new administration took office, it has recently been reactivated and oral argument has been set for December 18. Importantly, the 2015 ozone standard

was not stayed. Thus, under the requirements of the CAA, EPA has been implementing the standard, including by identifying non-attainment areas.

Recently, EPA announced that it has decided against reconsidering the 2015 ozone NAAQS, opting instead to evaluate concerns identified in its expedited review of the 2015 standard under the EPA Back-to-Basics memorandum. Under that memorandum, EPA staff was directed to begin the next ozone NAAQS review so that EPA will be ready to finalize any necessary revisions to the standard by the CAA-required five-year deadline in October 2020. Illustrating the complexity of EPA's task, among the issues that have been raised by outside stakeholders in recent NAAQS reviews and the litigation are: whether the 70-ppb standard should be tightened to 65 or 60 ppb, transparency in relying on studies where the underlying data is not publicly available, proximity of the standard to high background ozone levels, EPA's focus on individual responses in studies designed to evaluate group means, increased uncertainty regarding health effects at lower exposure levels and whether failure to account for that in standard-setting makes revision inappropriate, and whether the secondary standard should be set at a different level than the primary standard.

#### 3. Risk Management Program.

On May 30, 2018, EPA issued a proposed rule, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule, 83 Fed. Reg. 24,850 (May 30, 2018) (2018 Proposed RMP Rule) that would modify several of the provisions added to the RMP regulations via a final rule issued in January 2017 at the end of the Obama administration (2017 RMP Amendments) relating to safer technology and alternatives analyses, third-party audits, incident investigations, information availability, and several other areas, some it proposes to rescind. EPA also proposes modifications to provisions of the 2017 RMP Amendments relating to local emergency coordination and emergency exercises and the compliance dates for these provisions.

EPA's efforts at reviewing and potentially rescinding or modifying the 2017 RMP Amendments have been complicated by the recent decision by the D.C. Circuit in *Air Alliance Houston v. EPA* (D.C. Cir. Case No. 17-1155) vacating a final rule issued by the Agency in June 2017 to delay the effective date of the 2017 RMP Amendments (the Delay Rule), which had not yet taken effect when the Trump administration took office. The Delay Rule was intended to allow the Agency "to conduct a reconsideration proceeding and to consider other issues that may benefit from additional comment." 83 Fed. Reg. 24,855. The D.C. Circuit issued the mandate in this case on September 21, the Delay Rule has been vacated, and some provisions of the 2017 RMP Amendments are again effective even though EPA has not yet fully considered comments on the 2018 Proposed RMP Rule or issued a replacement rule.

#### 4. GHG Emissions Standards for Passenger Vehicles and Light Trucks.

On August 24, 2018, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a joint proposal to amend certain existing Corporate Average Fuel Economy (CAFE) and tailpipe carbon dioxide (CO<sub>2</sub>) emissions standards for passenger cars and light duty trucks and establish new standards for model years (MY) 2021 through 2026. NHTSA/EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Notice of Proposed Rulemaking, 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("SAFE Vehicles Proposed Rule"). The proposal, if finalized, would make less stringent CAFE and CO<sub>2</sub> emissions standards for MY 2022-2025 that were preliminarily issued by NHTSA and EPA, respectively, in a 2012 joint rule. In conjunction with these changes, EPA proposes to revoke a 2013 waiver of preemption under CAA Section 209, which allowed California to implement its Advanced Clean Car (ACC) regulations setting GHG emissions standards for MY 2017-2025. EPA also proposes to finalize its related findings that if state standards are preempted under the Energy Policy and Conservation Act (EPCA), EPA cannot issue a waiver of preemption under Section 209(b). EPA further proposes that, regardless of whether California could obtain a waiver, other states cannot opt into the California program. NHTSA proposes to finalize a finding that California's ACC program—in particular, its GHG and Zero-Emissions Vehicle (ZEV) requirements—is preempted under EPCA.

The joint proposal follows over a decade of debate and regulatory actions over the relationship between EPA and NHTSA with respect to emissions and fuel economy standard-setting under their respective statutory authorities. Also at issue is the proper role of California – which was granted the ability to obtain a waiver from the generally applicable preemption of state standards in CAA Section 209 provided statutory criteria are met.

#### STATE RESPONSES TO DATE

The response from the states to the above initiatives has been varied, in part, depending on the views of a particular state on the substantive content of the reform initiative, but also on other factors that may be particular to a given state. As a general rule, under the CAA, states have a number of options in terms of their responses to federal regulatory reform initiatives. Many states support such initiatives and have formed coalitions to voice their support in rulemakings, via amicus participation in litigation, or otherwise. Similarly, states that oppose such initiatives often either initiate or intervene to defend them in litigation brought by interest groups or other states. States also may use their regulatory powers to counteract any perceived relaxing of environmental and safety protections at the federal level. An interesting example of this latter approach is California's current proposal to rescind a provision in its motor vehicle emissions regulations that it previously promulgated in a compromise over the debate over federal GHG emissions standards, which provides that automakers' compliance with federal GHG emissions standards would be 'deemed to comply' with California's emissions standards. California's proposal, if finalized, would revise this 'deemed-tocomply' provision by limiting its scope to compliance with the GHG emissions standards

enacted by EPA under the previous administration. This action, taken in response to the EPA/NHTSA joint proposal in the SAFE Vehicles Proposed Rule, illustrates the interesting interplay between state and federal regulatory reform efforts.

### **CONCLUSION**

Whether the current regulatory reform efforts will stand the test of time, or survive judicial challenge, will be dictated by future events. What is clear now is that the states with their own regulatory and litigation responses will have something to say about it.

#### Message

From: Broome, Shannon S. [SBroome@hunton.com]

**Sent**: 10/1/2018 5:50:36 AM

To: Woods, Clint [woods.clint@epa.gov]; dpettit@nrdc.org; Brightbill, Jonathan (ENRD) [Jonathan.Brightbill@usdoj.gov]

**CC**: Ellis, Clare [CEllis@hunton.com]

Subject: 2018-09-30\_FINAL ABA\_Fall\_Conference\_-\_CLE\_Materials\_-\_Deregulat...docx
Attachments: 2018-09-30\_FINAL ABA\_Fall\_Conference\_-\_CLE\_Materials\_-\_Deregulat...docx.docx

Flag: Flag for follow up

All -

We are now officially late with the paper for the ABA conference. The attached reflects the limited comments received and I do think it is in good shape.

Do I have everyone's clearance to get this in? We have beefed up the disclaimer footnote so that no one can be "tagged" with the language in the paper. Again, it is an attempt to be neutral but to lay out the timing and a few of the issues as a "jumping off point" for our talk.

Please let me know if you have any issues with the paper by 3 pm Monday if you can or let me know that I should hold off – but again we are now late and we need a paper for the panel. My plan is to send in at 5 pm eastern barring objection ...

Thanks in advance for your assistance in getting this across the finish line!

#### Best Regards,



#### Shannon S. Broome

Partner/Office Managing Partner San Francisco sbroome@HuntonAK.com 415.975.3718 p 202.955.1912 m 415.818.2275

bio | vCard |

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EPA-HQ-2019-7378

American Bar Association
Section on Environment, Energy, and Resources

Fall Conference 2018

San Diego, California

Panel Paper: Deregulation in Focus: The Clean Air Act and States<sup>1</sup>

October 19, 2018

Elections have consequences. That's true regardless of the party that is currently sitting

in the White House or which party holds a majority in the Senate or House of Representatives.

Since the 2016 election, as with all national elections where a shift in the party of the president

occurs, steps are taken by the new administration to evaluate the policies and regulations of the

prior administration and to make adjustments that the new president deems appropriate. This

panel focuses on steps that the current administration undertook in this regard with respect to the

Clean Air Act (CAA), with additional focus on how the states have reacted. The purpose of this

paper, which was jointly prepared by all panelists, is to provide background on some of the

regulations that have been addressed by the Trump Administration to facilitate a productive

discussion.

A number of CAA regulatory programs have been implicated in the efforts of the Trump

Administration to evaluate President Obama's regulatory programs and determine if changes are

appropriate. While President Trump ran on a platform that promoted jobs and business, his

campaign speeches also supported clean air and clean water.<sup>2</sup> Since President Trump took

office, EPA has worked to review the actions of the prior administration, with particular focus on

<sup>1</sup> The following panelists contributed to this paper: Jonathan D. Brightbill, Shannon S. Broome, David Pettit, Clint Woods. The characterization of any particular position is not to be attributed to a particular author or the author's employer. Nothing in this paper necessarily reflects the views of the Department of Justice, any federal agency.

<sup>2</sup> The allocation of resources at the EPA is not entirely within any administration's control—statutes impose mandatory duties that require the agency to issue certain regulations according to specified schedules. In the case of the CAA Amendments of 1990, Congress specified many deadlines, and since that time, EPA has tried to meet those deadlines, but issuing such regulations often requires extensive and complex analyses (e.g., residual risk analyses for sources of hazardous air pollutants). As a result of the backlog, some of those regulations are now subject to court-ordered deadlines, which can affect EPA's allocation of its resources.

actions taken shortly before the presidential transition. As a result, EPA has issued proposals to revise, and in some cases rescind, regulations for some programs. Under the CAA, we focus below on: the background of the Clean Power Plan (CPP), which has been proposed to be replaced by the Affordable Clean Energy (ACE) regulation; the January 2017 Amendments to the CAA Section 112 Risk Management Program (RMP) regulations, which have been proposed to be substantially revised—and largely rescinded; the EPA greenhouse gas (GHG) standards with respect to state authority under the CAA to regulate vehicle GHGs for motor vehicles and light trucks; and the National Ambient Air Quality Standards (NAAQS) program, where EPA is evaluating the ozone NAAQS which was already in litigation when the presidential transition occurred and remains in effect while decisions are made regarding its status.

# **EXECUTIVE INITIATIVES ON REGULATION**

Soon after taking office in the beginning of 2017, President Trump issued a number of Executive Orders and Presidential Memoranda aimed at regulatory reform, cooperative federalism, aiding domestic manufacturing and energy production, and supporting infrastructure development. These executive actions are briefly described as follows:

- 1. Presidential Memorandum, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing" (Jan. 24, 2017). This memorandum directs the executive branch to reduce burdens on manufacturing by streamlining permitting. It directs the Department of Commerce to conduct outreach and request public comment on the impact of federal regulations on domestic manufacturing, and to develop a permit streamlining action plan within 60 days after the close of the comment period and to submit it to the President identifying priority actions and recommended deadlines.
- Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs"
   (Jan. 30, 2017). This order requires agencies to identify two regulations for repeal upon

each new significant regulatory proposal and to ensure that the total incremental cost of new regulation to be finalized in fiscal year 2017 is zero. In furtherance of this requirement, the order provides that any new incremental costs associated with new significant regulations shall be offset by the elimination of existing costs associated with at least two prior regulations.

- 3. Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017). This order creates a structure for identifying opportunities for regulatory reform in federal agencies. It requires agencies to appoint a Regulatory Reform Officer to implement regulatory reform initiatives, requires agencies to form a Regulatory Reform Task Force to evaluate existing regulations and, where appropriate, to make recommendations to the agency head regarding their repeal, replacement, or modification.
- 4. Executive Order 13781, "Comprehensive Plan for Reorganizing the Executive Branch" (Mar. 13, 2017). This order sets forth a plan to improve the efficiency, effectiveness, and accountability of federal agencies, including, as appropriate, to eliminate or reorganize unnecessary or redundant federal agencies. It directs agencies to submit a proposed plan to OMB to reorganize each covered federal agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency. It also directs OMB to conduct outreach and request public comment on any proposed plan and to submit the proposed plan to the President.
- 5. Executive Order 13783, "Promoting Energy Independence and Economic Growth" (Mar. 28, 2017). This order directs the EPA Administrator to review the CPP, as well as related rules and Agency actions. It orders federal agencies to immediately review all agency actions that potentially burden the safe, efficient development of domestic energy

resources. It orders the review of the estimates of the Social Cost of Carbon (SCC), Nitrous Oxide, and Methane for the purpose of Regulatory Impact Analyses. It also disbands the Interagency Working Group on the Social Cost of GHG and ordered the withdrawal of certain technical documents related to SCC. Finally, it rescinds certain prior energy and climate-related Presidential executive orders, memos, and regulatory actions and orders a review of regulations related to U.S. oil and gas development.

- 6. Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 15, 2017). This order directs that there be "One Federal Decision" for "major infrastructure projects," whereby a single federal agency serves as the lead point of contact for all National Environments Policy Act (NEPA) for issuing a single Record of Decision (ROD) on behalf of all involved agencies. It also requires that authorization decisions for the construction of a major infrastructure project be completed within 90 days of the issuance of a ROD by the lead Federal agency in most circumstances, and "not more than an average of approximately 2 years" after issuance of the Notice of Intent (NOI) to prepare a NEPA Environmental Impact Statement (EIS) or "other benchmark deemed appropriate by the Director of OMB."
- 7. Executive Order 13795, "Implementing An America-First Offshore Energy Strategy" (Apr. 28, 2017). This order requires the Department of Commerce to review all designations and expansions of National Marine Sanctuaries and Marine National Monuments within the 10-year period prior to the date of the order. It requires the Department of the Interior and Commerce to review numerous rules and guidance pertaining to off-shore energy development for potential revisions or withdrawal.

Presidential Memorandum, "Promoting Domestic Manufacturing and Job Creation - Policies and Procedures Relating to Implementation of Air Quality Standards" (Apr. 12, 2018). This memorandum directs the EPA Administrator to take specific actions to ensure efficient and cost-effective implementation of the NAAQS program, including with regard to permitting decisions for new and expanded facilities, and with respect to the Regional Haze Program. These actions are intended to ensure that "EPA carries out its core missions of protecting the environment and improving air quality in accord with statutory requirements, while reducing unnecessary impediments to new manufacturing and business expansion essential for a growing economy."

### CURRENT STATUS OF SELECTED EPA REGULATORY REFORM EFFORTS

EPA's regulatory reform actions following the above executive directives are summarized as follows:

#### 1. Clean Power Plan

On August 31, 2018, EPA published a proposed rule known as the Affordable Clean Energy or "ACE" rule, which is the Trump Administration's replacement for the Obama Administration's CPP regulations. See EPA, Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations: Revisions to New Source Review Program; Proposed rule, 83 Fed. Reg. 44746 (Aug. 31, 2018).

The proposed ACE rule includes revised emission guidelines for the development, submittal, and implementation of state plans to reduce greenhouse gas (GHG) emissions from certain Electric Generating Units (EGUs). The notice states that the Agency is proposing to determine that heat rate improvement measures are the "best system of emission reduction" (BSER) for existing coal-fired EGUs. The notice alsoproposes new regulations for the

implementation of emission guidelines that apply to this source category and any future emission guidelines issued, and proposes revisions to the New Source Review (NSR) permitting program to support the implementation of efficiency projects at EGUs without triggering NSR. EPA is taking comments on the proposed ACE rule through October 30, 2018.

#### 2. Ozone NAAQS

EPA has stated that it is working to review and reform the NAAQS program consistent with the Administration's commitment to regulatory reform, cooperative federalism, and domestic manufacturing (as articulated under the April 2018 Executive Memorandum summarized above and in a "Back-to-Basics" memorandum issued by EPA in response in May 2018). These efforts include a focus on getting "back-to-basics" for NAAQS setting, designations, and implementation.

Such efforts have been implicated in the Agency's review and reconsideration of EPA's October 2015 rule that reduced the ozone NAAQS from 75 parts per billion (ppb) to 70 ppb. Although D.C. Circuit litigation over this decision was held in abeyance for a period of time after the new administration took office, it has recently been reactivated and oral argument has been set for December 18. Importantly, the 2015 ozone standard was not stayed. Thus, under the requirements of the CAA, EPA has been implementing the standard, including by identifying non-attainment areas.

Recently, EPA announced that it has decided against reconsidering the 2015 ozone NAAQS, opting instead to evaluate concerns identified in its expedited review of the 2015 standard under the EPA Back-to-Basics memorandum. Under that memorandum, EPA staff was directed to begin the next ozone NAAQS review so that EPA will be ready to finalize any necessary revisions to the standard by the CAA-required five-year deadline in October 2020. Illustrating the complexity of EPA's task, issues that are expected to be raised in the next review

include issues that were at play in the issuance of the 2015 ozone standard, including, whether the 70-ppb standard should be tightened to 65 or 60 ppb, transparency in relying on studies where the underlying data is not publicly available, proximity of the standard to high background ozone levels, EPA's focus on individual responses in studies designed to evaluate group means, increased uncertainty regarding health effects at lower exposure levels and whether failure to account for that in standard-setting makes revision inappropriate, and whether the secondary standard should be set at a different level than the primary standard; and more.

### 3. Risk Management Program.

On May 30, 2018, EPA issued a proposed rule, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 83 Fed. Reg. 24,850 (May 30, 2018) (2018 Proposed RMP Rule) that would rescind or substantially modify provisions added to the RMP regulations via a final rule issued in January 2017 at the end of the Obama administration (2017 RMP Amendments) relating to safer technology and alternatives analyses, third-party audits, incident investigations, information availability, and several other areas. EPA also proposes modifications to provisions of the 2017 RMP Amendments relating to local emergency coordination and emergency exercises and the compliance dates for these provisions.

EPA's efforts at reviewing and potentially rescinding or modifying the 2017 RMP Amendments have been complicated by the recent decision by the D.C. Circuit in *Air Alliance Houston v. EPA* (D.C. Cir. Case No. 17-1155) vacating a final rule issued by the Agency in June 2017 to delay the effective date of the 2017 RMP Amendments (the Delay Rule), which had not yet taken effect when the Trump administration took office. The Delay Rule was intended to allow the Agency "to conduct a reconsideration proceeding and to consider other issues that may benefit from additional comment." 83 Fed. Reg. 24,855. The D.C. Circuit issued the mandate in

this case on September 21, the Delay Rule has been vacated and some provisions of the 2017 RMP Amendments are again effective even though EPA has not yet fully considered comments on the 2018 Proposed RMP Rule or issued a replacement rule. Given the complexity of the 2017 RMP Amendments and the pending substantial modifications of the regulation, there is much uncertainty in this program.

### 4. GHG Emissions Standards for Passenger Vehicles and Light Trucks.

On August 24, 2018, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a joint proposal to amend certain existing Corporate Average Fuel Economy (CAFE) and tailpipe carbon dioxide (CO<sub>2</sub>) emissions standards for passenger cars and light duty trucks and establish new standards for model years (MY) 2021 through 2026. NHTSA/EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Notice of Proposed Rulemaking, 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("SAFE Vehicles Proposed Rule"). The proposal, if finalized, would make less stringent CAFE and CO<sub>2</sub> emissions standards for MY 2022-2025 that were preliminarily issued by NHTSA and EPA, respectively, in a 2012 joint rule. In conjunction with these changes, EPA proposes to revoke a 2013 waiver of preemption under CAA Section 209, which allowed California to implement its Advanced Clean Car (ACC) regulations setting GHG emissions standards for MY 2017-2025. EPA also proposes to finalize its related findings that if state standards are preempted under the Energy Policy and Conservation Act (EPCA), EPA cannot issue a waiver of preemption under Section 209(b). EPA further proposes that because GHGs are not subject to air quality standards under the statute, regardless of whether California could obtain a waiver, other states cannot opt into the California program. NHTSA proposes to finalize a finding that California's ACC program—in particular, its GHG and Zero-Emissions Vehicle (ZEV) requirements—is preempted under EPCA.

The joint proposal follows over a decade of debate and regulatory actions over the relationship between EPA and NHTSA with respect to emissions and fuel economy standard-setting under their respective statutory authorities. Also at issue is the proper role of California – which was granted the ability to obtain a waiver from the generally applicable preemption of state standards in CAA Section 209 provided statutory criteria are met.

#### STATE RESPONSES TO DATE

The response from the states to the above initiatives has been varied, in part, depending on the views of a particular state on the substantive content of the reform initiative, but also on other factors that may be particular to a given state. As a general rule, under the CAA, states have a number of options in terms of their responses to federal regulatory reform initiatives. Many states support such initiatives and have formed coalitions to voice their support in rulemakings, via amicus participation in litigation, or otherwise. Similarly, states that oppose such initiatives often either initiate or intervene to defend them in litigation brought by interest groups or other states. States also may use their regulatory powers to counteract any perceived relaxing of environmental and safety protections at the federal level. An interesting example of this latter approach is California's current proposal to rescind a provision in its motor vehicle emissions regulations that it previously promulgated in a compromise over the debate over federal GHG emissions standards, which provides that automakers' compliance with federal GHG emissions standards would be 'deemed to comply' with California's emissions standards. California's proposal, if finalized, would revise this 'deemed-to-comply' provision by limiting its scope to compliance with the GHG emissions standards enacted by EPA under the previous administration. This action, taken in response to the EPA/NHTSA joint proposal in the SAFE Vehicles Proposed Rule, illustrates the interesting interplay between state and federal regulatory reform efforts.

# **CONCLUSION**

Whether the current regulatory reform efforts will stand the test of time, or survive judicial challenge, will be dictated by future events. What is clear now is that the states with their own regulatory and litigation responses will have something to say about it.

#### Message

From: Maeng, Yujin [Yujin.Maeng@americanbar.org]

**Sent**: 9/27/2018 7:27:33 PM

To: sbroome@huntonak.com; dpettit@nrdc.org; Woods, Clint [woods.clint@epa.gov]

CC: jsantini@parsonsbehle.com

**Subject**: 26th Fall Conference: Paper Deadline Reminder

Attachments: 26fallregform\_speaker.pdf; ppt\_template\_and\_guidelines.ppt; SEER\_26thFallConf\_brochure\_web.pdf

Dear Conference Speakers and Moderators:

#### Abstracts/Papers

This serves as a reminder that final abstracts/papers are due by **Friday**, **September 28**, **2018**. If you haven't done so already, please email your course materials to your panelists, your Planning Committee Liaison, and myself.

The Section recognizes authors of the "Best Papers" prepared for each major CLE conference. Authors must submit papers on time and papers are evaluated by the conference planning committee on originality, quality, analysis, usefulness, relevance, and format. Each author whose paper is selected is presented with a certificate of recognition at the CLE conference and receives a complimentary Section publication as a token of appreciation for his/her outstanding submission. To be considered for this distinguished achievement your paper must be received by the above deadline.

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#### Help Market the Conference

Personal outreach from our speakers is instrumental in building a successful event. We encourage you to consider promoting your role to help make this conference a great success. If appropriate, please share the Fall Conference brochure (attached) with your clients or colleagues who may be interested. Please encourage your network to visit www.ambar.org/environfall to register.

#### **Friends of Speaker Discount**

The Section has developed a special discount code for friends of speakers and moderators who wish to attend the conference. You colleagues can receive \$100 off their registration by entering the discount code **SPEAKER18** at the time of checkout or on their mail-in registration form. Feel free to share this code within your network.

#### Registration

The advance registration deadline is next week on Wednesday, October 3, 2018. If you are planning to attend the entire conference, we have developed a special rate of \$450. The registration form is attached. Speakers are invited to attend the conference free of charge on the day of their panel presentation only and will be registered internally by ABA staff after Wednesday, October 3, 2018.

#### Housing

Currently, our hotel block at the Marriott Marquis is closed. We are working on securing a hotel block at a nearby property. We will be sending out more information soon.

Thank you.

Sincerely,

# Yujin Maeng

Program Assistant Section of Environment, Energy, and Resources

American Bar Association | 321 North Clark Street | Chicago, IL 60654

T: 312.988.5642

Yujin.Maeng@americanbar.org | www.americanbar.org/seer



# October 17-20, 2018

Marriott Marquis San Diego Marina San Diego, California



Environmental, Energy, and Resources Law

# 26th EA NFEREN

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# 26<sup>th</sup> Fall Conference

October 17–20, 2018
Marriott Marguis San Diego Marina

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The ABA Section of Environment, Energy, and Resources is the premier forum for environmental, energy, and resources lawyers: a meeting place where practitioners can find the most current and sophisticated analyses of the complicated issues facing their practice.

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# Wednesday October 17, 2018

12:00 p.m. — 4:00 p.m. Public Service Project

6:00 p.m. - 6:30 p.m. VIP New Attendee Reception

6:30 p.m. - 8:00 p.m. Welcome Reception

#### Thursday October 18, 2018

7:00 a.m. — 8:00 a.m. Continental Breakfast

8:00 a.m. - 8:30 a.m. Welcome and Opening Remarks

8:30 a.m. — 10:00 a.m. Opening General Session

10:00 a.m. — 10:30 a.m. Networking Break

10:30 a.m. - 12:00 p.m. Concurrent Breakout Sessions

12:00 p.m. — 1:30 p.m. Committee Interest Area Luncheon

1:30 p.m. — 2:00 p.m. Expert Insight Panels

2:00 p.m. - 2:15 p.m. Refresh

2:15 p.m. — 3:45 p.m. Concurrent Breakout Sessions

3:45 p.m. — 4:15 p.m. Networking Break

4:15 p.m. — 5: 45 p.m. Concurrent Breakout Sessions

6:30 p.m. — 10:00 p.m. Cocktail Reception and Dinner

9:30 p.m. - 12:00 a.m. After-Hours Social Mixer

# Filday, October 19, 2018

6:45 a.m. - 7:45 a.m. #SEERRunClub

7:00 a.m. -- 8:00 a.m. Continental Breakfast

8:00 a.m. - 8:30 a.m. Welcome and Opening Remarks

General Session 8:30 a.m. -- 10:00 a.m.

10:00 a.m. - 10:30 a.m. Networking Break

10:30 a.m. - 12:00 p.m. Concurrent Breakout Sessions

12:00 p.m. - 1:30 p.m. Luncheon

2:00 p.m. - 2:15 p.m. Refresh

1:30 p.m. - 2:00 p.m. **Expert Insight Panels** 

2:15 p.m. - 3:45 p.m. Concurrent Breakout Sessions

3:45 p.m. - 4:15 p.m. Networking Break

4:15 p.m. -- 5:45 p.m. Ethics Session

6:30 p.m. - 9:30 p.m. Taste of SEER (Dine Arounds)

### Saturday October 20, 2018 - Leadership Day

8:00 a.m. - 9:00 a.m. Continental Breakfast

9:00 a.m. — 10:30 a.m. Committee Chairs Meeting

10:30 a.m. — 11:30 a.m. Vice Chair Working Groups

11:45 a.m. - 5:15 p.m. Council Meeting

# Wednesday, October 17, 2018

12:00 p.m. - 4:00 p.m.

PUBLIC SERVICE PROJECT

Support the San Diego community by joining fellow conference attendees on our public service project. No prior experience is necessary to participate in this fun networking opportunity. To volunteer for the public service project, please sign up when registering.

6:00 p.m. – 8:00 p.m.

WELCOME RECEPTION

Kick off the conference with food, drinks, and friends old and new. Meeting registration will be open so you can also pick up your name badge and conference materials.

# Thursday, October 18, 2018

8:30 a.m. - 10:00 a.m.

#### THE OBEAT ENFORCEMENT DERATE

Headlines blare that environmental enforcement levels are on a downward trajectory. Yet, some assert that enforcement is not the most effective means of assuring compliance and that resources are best devoted elsewhere. For its part, EPA emphasizes a cooperative federalism agenda as a means of strengthening, not weakening, enforcement and compliance. Environmental practitioners must understand all aspects of the issue to best advise their clients, particularly regulated entities. Join this lively discussion exploring the great enforcement debate, including the current state of civil and criminal environmental enforcement, enforcement trends and initiatives, the efficacy of enforcement versus other approaches to compliance assurance, gap-filling by advocacy groups through citizen suits and by state and local governments, state of the art enforcement tools. and self-disclosure and other voluntary programs.

#### MODERATOR:

Peter Hsiao, Morrison & Foerster LLP, Los Angeles, CA SPEAKERS:

**Sylvia Quast**, Regional Counsel, Region 9, U.S. Environmental Protection Agency, San Francisco, CA

Sambhav Sankar, Executive Director, Environmental Council of the States, Washington, DC

Justin Savage, Sidley Austin LLP, Washington, DC

#### 10:30 a.m. - 12:00 p.m.

CONCURRENT BREAKOUT SESSIONS

# WATER INFRASTRUCTURE AND RESOURCE ALLOCATION: LESSONS FROM CALIFORNIA

Throughout the United States, water scarcity and management have become critical issues—nowhere more so than in California. California's unique position as the leading supplier of agricultural products for the rest of the country and its continued population growth place tremendous demands on water in the West, requiring the construction and management of unprecedented water infrastructure projects. This panel, featuring perspectives from a range of key stakeholders, will examine the lessons that all states can learn from the policies governing, and disputes regarding. California water rights, water quality, and water resource infrastructure and management.

#### MODERATOR:

Chris Frahm, Brownstein Hyatt Farber Schreck, LLP, San Diego, CA

Tom Birmingham, General Manager, Westlands Water District, Frespo. CA

Mark Hattam, General Counsel, San Diego County Water Authority, San Diego, CA

Effeen Sobeck, Executive Director, State Water Resources Control Board, Sacramento, CA



#### Thursday contid

#### CHARGING UP TO DIRECT OUR ENERGY FUTURE: AN EXAMINATION OF STATE AND FEDERAL ROLES

Just as emerging energy technologies begin to realize their full potential, recent disasters have exposed the vulnerability of an interconnected grid. Recognizing this challenge—and in the face of questions about the fate of federal efforts to promote reliability, resiliency, energy efficiency, and alternative energy—state and local governments are stepping in to fill perceived gaps. States are enacting new energy efficiency standards, setting renewable fuels requirements, and working to meet international climate goals. Join us for an interactive examination of state and federal energy policy, the branch of government that ultimately determines the energy mix, and legal issues such as the Commerce Clause and cooperative federalism that intersect with the foundation of the rates, reliability, and resiliency of our nation's grid.

#### MODERATOR:

Malcom Woolf, Senior Vice President, Policy and Government Affairs, Advanced Energy Economy, Washington, DC

#### SPEAKERS:

Kyle H. Landis-Marinello, Vermont Public Utility Commission, Montpelier, VT

Kathleen Staks, Executive Director, Colorado Energy Office, Denver, CO

**Daniel Simmons**, Principal Deputy Assistant Secretary, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, Washington, DC

#### FROM PARIS TO PITTSBURGH AND BEYOND: NON-FEDERAL EFFORTS TO ADDRESS CLIMATE CHANGE

In the wake of President Trump's announced intention to withdraw from the Paris Agreement, sub-national, regional, and international actors have announced their own legal commitments to combat climate change. Meanwhile, cities and individuals are pursuing legal remedies under novel legal theories for alleged harms caused by major emitters and government failure to reduce greenhouse gas emissions. This panel will explore the status of international climate negotiations and efforts to implement the Paris Agreement; the flurry of new and modified state, local, and regional laws and initiatives to combat climate change; environmental justice impacts; and corporate efforts to integrate climate considerations into their business operations. Panelists will also provide updates on climate litigation, California's extension of its cap-and-trade program, incorporation of adaptation considerations into state and local planning decisions, and efforts to expand and link regional carbon trading programs with other states and Canada.

#### MODERATOR:

Kevin Poloncarz, Paul Hastings LLP, San Francisco, CA

#### \*SPEAKERS:

Vicki Arroyo, Executive Director, Georgetown Climate Center; Assistant Dean for Centers and Institutes; Professor from Practice, Georgetown University Law Center, Washington, DC Michael Wara, Senior Research Scholar, Stanford Woods Institute for the Environment, Director of the Climate and Energy Policy Program, Stanford, CA

#### 1:30 p.m. - 2:00 p.m.

#### EXPERT INSIGHT PANELS

Strengthen your substantive knowledge of some of the most pressing issues confronting environmental, energy, and natural resources lawyers today. Expert insight Panels will take you on a deep dive into technical issues from the nation's top environmental consultants and service providers.

# SIFTING THROUGH THE SEDIMENT: SOLVING CHALLENGES AT EPA MEGASITES

#### **ALTERECHO**

Addressing allocation and remediation challenges at multi-party EPA mega-sediment sites—especially those that involve numerous contaminant sources—can be vexing for all involved. Evolving EPA and state regulatory agency approaches can make it even tougher. AlterEcho offers a primer on how to take a broad approach to help clients cut through the complexity to find cost-effective solutions that beat the clock and satisfy the regulators, but don't break the bank.

#### SPEAKERS:

**David Batson**, Allocation and Mediation Expert, AlterEcho, Washington, DC

Patricia Derocher, President, AlterEcho, Chantilly, VA

# GREEN SKIES AWAIT: HOW TO NAVIGATE THE UNCHARTED WATERS OF ESG DISCLOSURE

#### BLOOMBERG ENVIRONMENT

In response to increased public awareness of and regulatory focus on environmental, social, and governance (ESG) issues, it is increasingly important for the legal community and other stakeholders to understand the relevance, risks, and opportunities related to ESG disclosure. The ongoing shift from voluntary to regulatory disclosure has broad implications for financial (and non-financial) reporting and risk modeling, supply chain due diligence, and peer analysis. The increased scrutiny of ESG performance also means that ESG factors and metrics should be considered as part of environmental due diligence for corporate and commercial transactions. This session will focus on the growing demand for disclosure, how the financial industry is determining materiality and best practices. as well as stakeholder trends driving engagement around this information. It also will explore the issue of data transparency and review the existing standards and reporting frameworks available to practitioners.

#### MODERATOR:

**Dylan Bruce,** Managing Editor, Bloomberg Environment, Arlington, VA

#### SPEAKER:

Lee O'Dwyer, Global ESG Advocate, Bloomberg LP, San Francisco: CA

#### Thursday contid

# THE BUZZ ON ENVIRONMENTAL CONCERNS BEI ATEN TO THE CANNABIS INDUSTBY

GEOSYNTEC CONSULTANTS, INC.

With the approval of the Adult Use of Maniuana Act in 2016 and subsequent legalization on January 1, 2018, cannabis cultivators in California are subject to environmental permit requirements. This presentation will describe environmental compliance challenges in light of the current legalization status of cannabis. Of particular interest is the State Water Resources Control Board's new Cannabis Cultivation Program, approved in December 2017. This program addresses potential water quality and quantity issues related to cannabis cultivation and requires all cultivators to apply for coverage under the Cannabis Cultivation General Order, Additional interest areas include the requirement of CDFW 1602 permits for facilities not connected to municipal water supplies: compliance with the Stormwater Industrial General Permit: and air permitting related to carbon filtration and odor control. Cannabis is decriminalized in certain states and approved for recreational use, but remains classified by the federal government as a Schedule 1 drug. Companies need to be aware of situations where federal regulations trump state programs.

#### SPEAKER:

Sam Williams, Senior Principal Hydrogeologist, Geosyntec Consultants, Inc., San Diego, CA

#### 2:15 p.m. - 3:45 p.m.

#### CONCURRENT BREAKOUT SESSIONS

#### TRAVERSING THE TERRAIN OF PUBLIC LAND LAW

The proper role of the federal government on public land is not only a question of law, but a matter of perspective, from walking the hallowed halls of the U.S. Department of the Interior in Washington, D.C., to fracking a well on a dusty plateau or hiking a majestic, mountainous trail. This panel will examine current, dramatic shifts in public land law and policy, with a special focus on the conflict between development and conservation under the "multiple use" mandate, how discretionary authority can advance a deregulatory agenda, the legal dynamics of major shifts in land management planning, and other hot topics. Leading public land law practitioners will highlight national monuments, the repeal of various energy regulations and the reversals of conservation policies, and the newfound legal limitations on the exercise of agency authority. Bring your water bottle and a backpack—we will be covering a lot of terrain!

#### MODERATOR:

**David Hayes**, Executive Director, State Energy & Environmental Impact Center, Washington, DC

#### \*SPEAKERS:

Janice Schneider, Global Vice Chair, Environment, Land and Resources Department, Latham & Watkins LLP, Washington, OC Sandra Snodgrass, Holland & Hart LLP, Denver, CO

#### THE LONG ROAD TO SUPERFUND REFORM

The current administration is pushing forward with a multipronged effort to reform EPA's Superfund program, through its Superfund Task Force, top-down leadership, and various policy changes. But in nearly 40 years, the program has proven resistant to significant change, despite efforts by the regulated community, congressional initiatives, and litigation by the environmental bar. This session will provide attendees insight into EPA's reform activities, including the status of action on the strategic goals announced by the Superfund Task Force. It will also cover other newsworthy Superfund legal developments, including the administration's infrastructure proposal.

#### MODERATOR:

Michael Kavanaugh, Senior Principal Environmental Engineer, Geosyntec Consultants, Oakland. CA

#### SPEAKERS

**Steven Cook**, Deputy Assistant Administrator, Office of Land and Emergency Management, U.S. Environmental Protection Agency, Washington, DC

Todd Davis, Chief Executive Officer, Hemisphere, Bedford, OH. Jessica Merrigan, Lathrop Gage LLP, Kansas City, MO

#### SEEKING CERT(AINTY): RECENT SUPREME COURT DECISIONS ON ENVIRONMENTAL, ENERGY, AND RESOURCES LAW

The U.S. Supreme Court is determining the ultimate fates of key environmental, energy, and resources initiatives of the Obama and Trump administrations. The Court is also weighing in on the constitutionality of state and tribal initiatives to fill the caps in environmental, energy, and resources regulation created by changing priorities at the federal level. Even decisions on seemingly unrelated matters can have massive impacts on the authority of sovereign entities, non-profit groups, and individuals to protect the environment. A panel of leading Supreme Court scholars and practitioners will provide an in-depth review of recent decisions and upcoming cases, highlighting how actions by the nation's highest court might impact your practice. In addition to analyzing cases that have already reached the Court, the panel members will offer their thoughts on cert-worthy cases waiting in the wings.

#### MODESATOS:

Mary Ann Grena Manley, Deputy Editorial Director, Bloomberg Environment, Arlington, VA

#### SPEAKERS:

Richard Faulk, Davis Wright Tremaine LLP, Washington, DC Alice Kaswan, Professor and Dean's Circle Schoolar, University of San Francisco School of Law, San Francisco, CA

James May, Distinguished Professor of Law, Widener University Delaware Law School, Wilmington, DE

#### Thursday cont'd

#### 4:15 p.m. - 5:45 p.m.

#### CONCURRENT BREAKOUT SESSIONS

# REVERSING COURSE: ADMINISTRATIVE LAW IN A TIME OF CHANGE

President Trump was elected on a platform that called for rolling back many Obama-era environmental, energy, and resources policies and regulations. As EPA, the U.S. Department of the Interior, and other federal agencies have attempted to make good on that promise, they have faced a torrent of litigation, which in turn has triggered important developments in administrative law. This panel will present a pragmatic, nuts-and-bolts discussion about how an agency can eliminate or after a final regulation that was itself based on a massive administrative record—and what your clients can do to support, or oppose, such a regulatory change. Examples will be drawn not only from our energy, environment, and resources practices, but also from other hot areas of law, such as immigration.

#### MODERATOR:

Andy Mergen, Deputy Section Chief, Appellate Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC

#### SPEAKERS:

Amanda Leiter, Professor of Law, Washington College of Law, American University, Washington, DC

Matthew Leopold, General Counsel, U.S. Environmental Protection Agency, Washington, DC (invited)

**Brenda Mallory**, Executive Director and Senior Counsel, Conservation Litigation Project, Washington, OC

# WHEN IT'S "KIND OF A BIG DEAL": ASSESSING AND RESPONDING TO ISSUES THAT THREATEN A DEAL OR PROJECT

While some environmental, health, and safety (EHS) risks frequently arise in brownfields redevelopments, M&A transactions, and in related compliance matters, there are lurking, less predictable "big deal" issues that can arise and throw a major wrench into your deal or project. Attendees participating in this interactive workshop will learn how to approach complex transactional issues that cannot be easily negotiated in a purchase agreement or resolved with an indemnity, insurance policy, escrow, or purchase price reduction; a slight modification to development plans/schedule; or notice to regulators. Attendees will engage in a cooperative competition, confronting real-world scenarios assessing EHS, climate change, disclosures, and compliance matters.

#### MODERATOR:

Alexandra Farmer, Kirkland & Ellis LLP, Washington, DC

#### \*SPFAKERS:

Deidre Sanders, Ph.D., Director of Government and Community Affairs, East Bay Community Energy, Oakland, CA Deborah Harris, Section Chief, Environmental Crimes Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC

# 

# FUNDAMENTAL RIGHTS OR FUNDAMENTALLY WRONG: CONSTITUTIONAL AND PUBLIC TRUST ARGUMENTS FOR ENVIRONMENTAL PROTECTION

Local governments, citizens groups, and environmental organizations are finding novel ways to use constitutional arguments to advance their environmental protection goals, including environmental justice. National and state constitutional guarantees of clean air, pure water, and environmental preservation are being used to challenge state agency permitting and other actions and a new wave of constitutional issues are being raised in environment, energy, and resources litigation and regulatory actions. Panelists will explain the types of constitutional arguments that are being raised and how courts and regulatory agencies are handling these issues, as well as discuss implications for your practice and what the future in environmental advocacy/protection might hold.

#### \*SPEAKERS:

Alexandra C. Chiaruttini, Chief Counsel, Pennsylvania Department of Environmental Protection, Hamisburg, PA Carroll Muffett, President, Center for International Environmental Law, Washington, DC

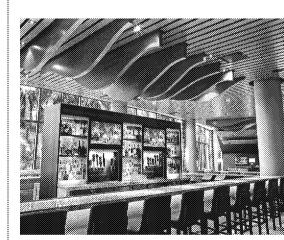
# 7:00 p.m. – 9:30 p.m. cocktail reception and dinner

Join us for a fun-filled evening under the stars and adjacent to the beautiful San Diego Marina. The Section Dinner is always one of the outstanding networking events of the conference and the reception and dinner are included in your registration fee; additional guest tickets can be purchased.

#### 9:30 p.m. - 12:00 a.m.

#### AFTER-HOURS SOCIAL MIXER

The party is not over yet! Join our informal, afterhours mixer event to kick-back and hobnob with your fellow attendees. All are welcome!



# Friday, October 19, 2018

6:45 a.m. - 7:45 a.m.

# #SEERRUNCLUB - SPONSORED BY FIMER STAHLLIP

Join your colleagues and make new friends on a casual fun run/walk. As a bonus, you will receive a commemorative tee shirt to remember the occasion. All are welcome for this fun networking event. Start your day off right with a run or walk outdoors near the bay. Be sure to sign up when you register.

#### 8:30 a.m. - 10:00 a.m.

#### THE FOOTPRINTS THAT TECH GIANTS ARE LEAVING ON THE ENVIRONMENTAL, ENERGY, AND NATURAL RESOURCE LANDSCAPE

Technology company environmental footprints and operations are expanding and they are seeing increased energy use and environmental risks. As this industry dominates the global marketplace, it has become more sensitive to environmental issues and in-house environmental, health, and safety groups are becoming commonplace. Leading environmental in-house counsel from this important sector will walk you through the full suite of issues, such as energy, water, power supply, supply chain, the circular economy, hazardous waste, automated vehicles, drones, data centers, property acquisitions, and clean transportation. Understanding these concerns will help you better counsel your clients.

#### MODERATOR:

Roger Martella, General Counsel, General Electric, Boston, MA

Paul Hemmersbaugh, Chief Counsel and Public Policy Director, General Motors, Washington, DC

Steven Sarno, Corporate Counsel, Environmental Compliance, Amazon, Seattle, WA (invited)

#### 10:30 a.m. - 12:00 p.m.

#### CONCURRENT BREAKOUT SESSIONS

# STAYING AFLOAT IN THE DELUGE OF CLEAN WATER ACT DEVELOPMENTS

This year began with significant court decisions and unprecedented agency actions covering the most important and controversial regulatory programs under the Clean Water Act. While new theories on liability, like the "groundwater conduit" theory, flow through the federal courts, a torrent of other issues related to the development and implementation of multi-state Total Maximum Daily Loads and the application of the EPA's water transfers rule are coming to a head nationwide. All of this is occurring along with the administration's deregulatory efforts, which include rescinding and potentially redefining "waters of the United States." Join this group of leading Clean Water Act authorities as they share their insights on the current state of the legal landscape, changes on the horizon, and solutions for clients during this era of increasing change.

#### MODERATOR:

Kristy Niehaus Bulleit, Hunton Andrews Kurth LLP, Washington, DC

#### SPEAKERS:

Steve Fleischli, Senior Attorney & Senior Director for Water Initiatives, Natural Resources Defense Council, Santa Monica, CA David Ross, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, Washington, DC Brooks Smith, Troutman Sanders LLP, Richmond, VA

#### FASTER, CHEAPER, BETTER: THE MODERN APPROACH TO ENVIRONMENTAL REVIEWS AND PERMITTING

As politicians call for modernizing our nation's crumbling infrastructure, the common refrain is that delays and litigation resulting from the environmental review and permitting process impede projects to improve our transportation network, energy grid, and water and sewer systems. The challenge is to accelerate the environmental review and permitting process, without compromising our valuable natural resources or individual community. initiatives. Provisions of the Fixing America's Surface Transportation (FAST) Act require federal agencies to improve the process under the National Environmental Policy Act (NEPA) and other statutes. President Trump has issued a broad infrastructure plan, including legislative proposals that build on his executive orders directing agencies to expedite environmental reviews and to deliver projects with "One Federal Decision." This panel will discuss NEPA implementation through the lens of the FAST Act, mitigation, public-private partnerships, tribal perspectives, and litigation. Join a lively exchange as these thought-leaders and practitioners discuss how we may strike a balance between protection and progress.

#### MODERATOR

William Malley, Perkins Cole LLP, Washington, DC

#### \*cscavosc

Michael Drummond, Deputy Associate Director for The National Environmental Policy Act, White House Council on Environmental Quality, Washington, DC

Pilar Thomas, Lewis Roca Rothgerber Christie LLP, Tucson, AZ



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# SERVICE AND SPECIAL USE

#### Friday cent'd

#### EXPECT THE UNEXPECTED: COUNSELING CLIENTS BEFORE, DURING, AND AFTER NATURAL DISASTERS

Last year marked the most expensive year on record for disasters in the United States. Hurricanes Harvey, Irma, and Maria combined with devastating Western wildfires and other natural catastrophes resulted in wide-spread power outages, flooding, devastated infrastructure, and displaced communities. This panel will examine the role of lawyers in disaster prevention, emergency response, and long-term recovery. You will learn about current and emerging issues in disaster preparedness and recovery and how you can best advise your clients before, during, and after a disaster event. Topics to be addressed include challenges facing Superfund and waste cleanup efforts, grid resilience, facility and operations planning, federal and state government obligations and assistance, and employer obligations.

#### MODERATOR:

Lois Schiffer, Former General Counsel, National Oceanic and Atmospheric Administration, Washington, DC

#### \*SPEAKEBS:

**Tracy Hester**, Professor, University of Houston Law Center, Houston, TX

Robert R.M. Verchick, Gauthier-St. Martin Eminent Scholar and Chair in Environmental Law, Loyola University New Orleans College of Law Senior Fellow, Disaster Resilience Leadership Academy, Tulane University, New Orleans, LA

#### 2:15 p.m. - 3:45 p.m.

#### CONCURRENT BREAKOUT SESSIONS

# ECOSYSTEM MARKETS: WHAT THEY ARE AND HOW TO MAKE THEM WORK FOR YOUR CLIENTS

Environmental law began with command and control; now market mechanisms are being added to more easily or efficiently achieve desired goals. Economic demand and supply makes markets, but laws and regulations can direct economic demand and supply. Panelists will explain the laws and regulations that drive those economic levers across the Clean Water Act, the Endangered Species Act, CERCLA and natural resource damages, and more. These markets are rapidly developing in the United States, European Union, and around the world. Panelists will describe common legal issues that arise when utilizing these markets, the most common types of market mechanisms, and how to make these markets effective so that your clients achieve both compliance and environmental benefits.

#### MODERATOR:

Tom Lindley, Perkins Coie LLP, Washington, DC

#### SPEAKERS:

Julie Mentzer, Director of Environmental Operations, Wildlands PNW Portland, OR

Erika K. Powers, Chair, Environmental Department, Barnes & Thomburg LLP, Chicago, IL

#### DEFINING THE FUTURE OF OFFSHORE ENERGY

The current administration has announced plans to open large sections of the United States Outer Continental Shelf to offshore oil drilling for the first time in decades. California, Florida, and other states have already expressed strong opposition to any new exploration and production activities off their coasts, raising important questions about the states' ability to influence drilling activity on federal lands. At the same time, many states are looking offshore for sources of renewable energy. This panel will explore the vast potential of the Outer Continental Shelf as part of our energy future. Attendees will learn about the federal and state regimes that control offshore energy development and how competing energy uses on the Outer Continental Shelf can be managed.

#### MODERATOR:

Paul Heberling, Consultant, WSP Inc., Washington, DC

#### \*SPPARERS:

Joan Barminski, Pacific Region Director, Bureau of Ocean Energy Management, Camarillo, CA

Randall Luthi, President, National Ocean Industries Association, Washington, DC

#### DEREGULATION IN FOCUS: THE CLEAN AIR ACT AND STATES

The administration's executive orders, regulation changes, and other deregulatory efforts are reshaping the Clean Air. Act landscape. We have seen an effort to repeal and replace the Clean Power Plan as well as a reexamination of many major regulations associated with the act. Moreover, EPA has set out to recalibrate the state and federal relationship with greater deference to state administrators implementing the Clean Air Act. The intensity of this deregulation discussion is no more apparent than in California, where the state environmental agency leads with some of the most protective environmental laws in the nation, including its authority through a special waiver to set Californiaspecific motor vehicles emission standards. Join us for a discussion of the changing (or in some cases, unchanged) regulatory landscape under the act and learn how states have responded to recent and potential changes.

#### MODERATOR:

Shannon Broome, Hunton Andrews Kurth LLP, San Francisco, CA \*SPEAKERS:

David Pettit, Senior Attorney, Natural Resources Defense Council, Santa Monica, CA

Clint Woods, Deputy Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency, Washington, DC

Friday contid

4:15 p.m. - 5:45 p.m.

# ETHICS: THAT'S ALL THE NEWS FOR TODAY—STAY ETHICAL, SAN DIEGO

Using factual scenarios ripped from the headlines, a distinguished panel will dissect ethical and professional responsibility issues related to real life practice missteps that have gotten lawyers in trouble in recent years. Among the issues that will be discussed are conflicts of interest, confidentiality, use of social media, responsibility for non-lawyers, and the use of inadvertently sent emails. The panel will take attendees through the applicable ABA Model Rules that are implicated in these examples including Rules 1.6, 1.7, 5.3, and 7.1 and provide practical guidance for avoiding any ethical pitfalls.

#### \*SPEAKERS:

Dayna Underhill, Holland & Knight LLP, Portland, OR Irma Russell, Professor, University of Missouri School of Law, Kansas City, MO

\*additional speakers to be confirmed, speakers subject to change



# Saturday, October 20, 2018

# LEADERSHIP DAY

Whether you hold a Section leadership position or not, everyone is welcome to attend Leadership Day events. Attending any of the meetings is the best way to learn about the Section, its committees, and opportunities for involvement.

8:00 a.m. - 9:00 a.m.

CONTINENTAL BREAKFAST

9:00 a.m. - 10:30 a.m.

#### COMMITTEE CHAIRS MEETING

Committee chairs will join Section leadership and Council liaisons to discuss strategies for the year. This is an excellent opportunity to meet chairs of other Section committees and plan cooperative initiatives.

#### 10:30 a.m. - 11:30 a.m.

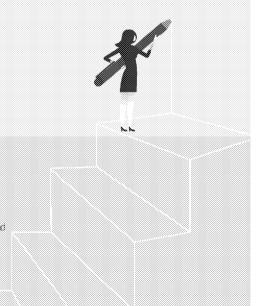
#### VICE CHAIR WORKING GROUPS

Committee vice chairs will meet with their peers in the same committee leadership role committee newsletters, marketing and communications, membership, programs, social media, and The Year in Review. Leadership responsibilities will be outlined and there will be time for questions and group discussion.

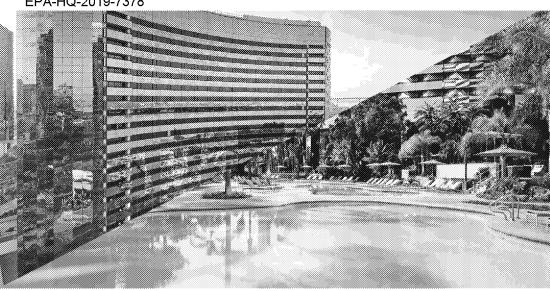
11:45 a.m. - 5:15 p.m.

COUNCIL MEETING

Everyone is welcome to attend.



FPA-HQ-2019-7378



# **CONFERENCE HOTEL HIGHLIGHTS**

- Spacious accommodations offer either scenic city or waterfront views
- Take a dip in one of two freeform swimming pools
- Indulge in an onsite spa treatment or keep your workout routine in the fitness center
- Enjoy award-winning cuisine at Marina Kitchen Restaurant & Bar or sample inventive Asian-fusion at Roy's

A block of rooms has been reserved at the Marriott Marquis San Diego Marina at the discounted rate of \$299 plus tax for single/double rooms. A limited number of government rate rooms are also available for \$140 plus tax (or the current government rate). A valid government ID will be required upon check in.

The deadline for room reservations at the discounted rate is **Tuesday, September 25, 2018** at 5:00 p.m. (CST). To book our contracted rate, call reservations at (800) 228-9290 or the hotel directly at **(619) 234-1500** or reserve online at **https://bit.ly/2LbYAhl**. Be sure to mention the ABA Section of Environment, Energy, and Resources 2018 Fall Conference.

#### **ROOM SHARE PROGRAM**

Are you are interested in sharing a room at the Marriott Marquis? Head to the travel and lodging page at **ambar.org/environfall** to learn more and fill out our room share questionnaire.



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# HEREKE BARRON BERRINARION

# 26th Fall Conference

# San Diego

# October 17–20, 2018 Marriott Marguis San Diego Marina

| REGISTRATION RATES                              | Early Bird | After 9/7/18 |
|-------------------------------------------------|------------|--------------|
| Section Member                                  | \$745      | \$795        |
| ABA Member                                      | \$820      | \$870        |
| General Attendee                                | \$895      | \$945        |
| Section Member Gov't, Public Interest, Academic | \$625      | \$675        |
| Gov't, Public Interest, Academic                | \$675      | \$725        |
| Young Lawyer*                                   | \$675      | \$725        |
| Speaker and Moderator                           | \$450      | \$450        |
| Law Student                                     | \$50       | \$50         |

The registration fee includes tuition and online course materials developed especially for this conference. In addition, your fee covers Wednesday's public service project, and reception, Thursday's continental breakfast, breaks, lunch, reception and dinner, and friday's continental breakfast, breaks, and lunch. The registration fee also covers breakfast and lunch during Saturday's Leadership Day.

#### MORE WAYS TO SAVE Group Discount California Bar Discount Day Rates Organizations registering three or We are offering members of the State Bar Day rates are available for \$450 each day. more attendees are eligible for a group of California and the California Lawvers This rate does not include discount of 20% off each attendee's Association \$50 off their registration Thursday's dinner. registration. Please email rate. To redeem, enter the coupon code environ@americanbar.org SEERCA18 when registering. for more information.

#### **HOW TO REGISTER**

We encourage you to register online at www.ambar.org/environfall. If you want to register by mail visit www.ambar.org/environfall to download a registration form. Please mail the form with your check (payable to the American Bar Association) or credit card information to: American Bar Association, Attn: Service Center—Meeting/Event Registrations Department, 321 N. Clark St., Fl. 19, Chicago, IL 60654 or to our secure fax number: (312) 988-5850. All attendees must be preregistered for this conference to participate.

#### ATTENTION ABA MEMBERS!

If you are an ABA member but not a member of the Section of Environment, Energy, and Resources, your conference registration fee now includes Section membership, a \$75 value! You will be automatically enrolled in the Section. ABA membership is a prerequisite of Section membership. If you are not already an ABA member, please call (800) 285-2221. Free membership only applies to individuals who have not been a member of the Section during the past two years.

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<sup>\*</sup> Qualifying young lawyers are under 36 years old or admitted to practice for five years or less.

#### ACHIEVING CARBON NEUTRALITY

Calculated with great care, the Section estimates that the average 26th Fall Conference attendee's participation will generate approximately one metric ton of carbon emissions. Help offset your carbon footprint by adding the cost of a one-ton carbon credit from a verified offset project that will reduce greenhouse gases. Contributions to The Fund for Justice and Education (FJE) are tax deductible to the full extent allowed by law. Purchase your carbon offset when you register.

#### CONFERENCE SPEAKER SUPPORT

The Section strives to provide programming representing a unique depth of perspectives on all issues. We consistently work to include speakers on panels that represent tribal interests, NGO's, and academics. To assist these speakers with the expense of attending conferences the Section offers a limited number of travel reimbursements. To assure that the Section can continue to offer travel assistance to such speakers please consider donating to our Program Support Fund. Donations are tax deductible to the full extent allowed by law. Make your donation of \$25 for more) when you register.

#### EARLY BIRD DEADLINE

The deadline to receive the early bird registration rate for the 26th Fall Conference is **Friday**, **September 7**, **2018**. The final cutoff date for advance registration is **Wednesday**, **October 3**, **2018**. After this date, registrations must include an additional \$25 for processing.

#### CANCELLATION POLICY

Registrants who are unable to attend the conference will receive a refund less a \$50 administrative fee if written notice of cancellation is received by **Wednesday**, **October 3**, **2018**. No refunds will be granted after this date. Cancellations may be e-mailed to environ 
americanbar.org or faxed to (312) 989-5572, attn.: Associate Director. Registration fees are not transferable to other Section or ABA programs. Substitutions for the pregram are acceptable. The ABA reserves the right to cancel any program and assumes no responsibility for personal expense.

#### TUITION ASSISTANCE

A limited number of registration fee waivers are available for government employees, public interest lawyers employed with nonprofit organizations, and academics. For programs with furition costs over \$500, qualifying lawyers will receive at least a 50% reduction in the course fee(s). This does not include any reduction in meals, lodging, or travel costs associated with the course. To apply, complete the online application by visiting www.ambar.org/environfall and clicking Registration by Wednesday, September 5, 2018.

#### LAW STUDENT SCHOLARSHIP OPPORTUNITY

A limited number of scholarships are available to law students interested in attending the entire conference and helping ensure our conference runs smoothly. To be considered, you must be a member of the ABA Section of Environment, Energy, and Resources. Your application and resume must be submitted by **Friday, September 14**, 2018 to be considered. **This scholarship does not include lodging or transportation**.

Visit www.ambar.org/environfall for additional meeting information Questions? Contact environ@americanbar.org.

#### CONFERENCE COURSE MATERIALS

Course materials and related background information will be provided to attendees online prior to the conference. You may wish to bring a device to view the materials on-site; complimentary Wi-Fi access will be available.

#### CLE CREDIT

The ABA directly applies for and ordinarily receives CLE credit for ABA programs in AK, AL, AB, AZ, CA, CO, CT, DE, GA, GU, HI, IA, IL, IN, KS, KY, LA, ME, MN, MS, MO, MP, MT, NH, NJ, NM, NV, NY, NC, ND, OH, OK, OB, PA, SC, TN, TX, UT, VT, VA, VI, WA, WI, and WV. These states sometimes do not approve a program for credit before the program occurs. This transitional program is approved for both newly admitted and experienced attorneys in NY. Attorneys may be eligible to receive CLE credit through reciprocity or attorney self-submission in other states. For more information about CLE accreditation in your state, contact Allison Read at allison.read@americanbar org or {312} 988-5641.

#### DRESS

Section conferences are business casual. Suggested dress includes slacks, skirts, polo-type shirts or blouses, sweaters, and comfortable shoes. The hotel will be cool, so please pack a jacket or sweater

#### DIETARY RESTRICTIONS

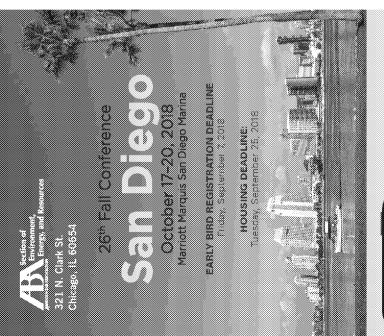
If you have any dietary restrictions, please indicate so during registration or by email environ@americanbar.org by Wednesday, October 3, 2018, so that your needs are noted.

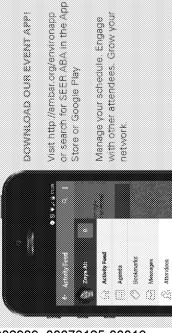
#### AMERICANS WITH DISABILITIES ACT

If any special arrangements are required for a person with a disability to attend this conference, please call Allison Read at (312) 988-5641 by **Wednesday**, **October 3**, **2018** 

Questions? Contact environ@americanbar.org with all program related questions.

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#### Message

From: Broome, Shannon S. [SBroome@hunton.com]

**Sent**: 9/27/2018 3:52:22 PM

To: Woods, Clint [woods.clint@epa.gov]

Subject: Review this one edits\_-\_2018-09-23\_DRAFT\_ABA\_Fall\_Conference\_-\_CLE\_Materials\_-\_Deregulat..\_.DOCX

Attachments: edits\_-\_2018-09-23\_DRAFT\_ABA\_Fall\_Conference\_-\_CLE\_Materials\_-\_Deregulat..\_.DOCX

Clint – please use the attached version because it includes Jon Brightbill's edits. David Pettit didn't have any edits.

American Bar Association
Section on Environment, Energy, and Resources
Fall Conference 2018
San Diego, California

Panel Paper: Deregulation in Focus: The Clean Air Act and States1

#### October 19, 2018

Elections have consequences. That's true regardless of the party that is currently sitting in the White House or which party holds a majority in the Senate or House of Representatives. Since the 2016 election, as with all national elections where a shift in the party of the president occurs, steps are taken by the new administration to evaluate the policies and regulations of the prior administration and to make adjustments that the new president deems appropriate. This panel focuses on steps that the current administration undertook in this regard with respect to the Clean Air Act (CAA), with additional focus on how the states have reacted. The purpose of this paper, which was jointly prepared by all panelists, is to provide background on some of the regulations that have been addressed by the Trump Administration to facilitate a productive discussion.

A number of CAA regulatory programs have been implicated in the efforts of the Trump Administration to evaluate President Obama's regulatory programs and determine if changes are appropriate. While President Trump ran on a platform that promoted jobs and business, his campaign speeches also supported clean air and clean water, Since President Trump took office, EPA has worked to review the actions of the prior administration, with particular focus on

**Commented [A1]:** This footnote's focus on the relatively small category of section 112 residual risk rules is a little unclear. It also seems a bit in the weeds for an intro discussion.

From SSB –I was trying to be balanced in that we often get people

From SSB – I was trying to be balanced in that we often get people saying the administration is slow walking regulations when in fact it inheretied a huge backlog. I broadened and softened consistent with your comments – could you review?

<sup>&</sup>lt;sup>1</sup> The following panelists contributed to this paper: Jonathan D. Brightbill, Shannon S. Broome, David Pettit, Clint Woods. The characterization of any particular position is not to be attributed to a particular author or the author's employer. Nothing in this paper necessarily reflects the views of the Department of Justice, any federal agency.

<sup>&</sup>lt;sup>2</sup> The allocation of resources at the EPA is not entirely within any administration's control—statutes impose mandatory duties that require the agency to issue certain regulations according to specified schedules. In the case of the CAA Amendments of 1990, Congress specified many deadlines, and since that time, EPA has tried to meet those deadlines, but issuing such regulations often requires extensive and complex analyses (e.g., residual risk analyses for sources of hazardous air pollutants). As a result of the backlog, some of those regulations are now subject to court-ordered deadlines, which can affect EPA's allocation of its resources.

actions taken shortly before the presidential transition. As a result, EPA has issued proposals to revise, and in some cases rescind, regulations for some programs. Under the CAA, we focus below on: the background of the Clean Power Plan (CPP), which has been proposed to be replaced by the Affordable Clean Energy (ACE) regulation; the January 2017 Amendments to the CAA Section 112 Risk Management Program (RMP) regulations, which have been proposed to be substantially revised—and largely rescinded; the EPA greenhouse gas (GHG) standards with respect to state authority under the CAA to regulate vehicle GHGs for motor vehicles and light trucks; and the National Ambient Air Quality Standards (NAAQS) program, where EPA is evaluating the ozone NAAQS which was already in litigation when the presidential transition occurred and remains in effect while decisions are made regarding its status.

#### **EXECUTIVE INITIATIVES ON REGULATION**

Soon after taking office in the beginning of 2017, President Trump issued a number of Executive Orders and Presidential Memoranda aimed at regulatory reform, cooperative federalism, aiding domestic manufacturing and energy production, and supporting infrastructure development. These executive actions are briefly described as follows:

- 1. Presidential Memorandum, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing" (Jan. 24, 2017). This memorandum directs the executive branch to reduce burdens on manufacturing by streamlining permitting. It directs the Department of Commerce to conduct outreach and request public comment on the impact of federal regulations on domestic manufacturing, and to develop a permit streamlining action plan within 60 days after the close of the comment period and to submit it to the President identifying priority actions and recommended deadlines.
- Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs"
   (Jan. 30, 2017). This order requires agencies to identify two regulations for repeal upon

each new significant regulatory proposal and to ensure that the total incremental cost of new regulation to be finalized in fiscal year 2017 is zero. In furtherance of this requirement, the order provides that any new incremental costs associated with new significant regulations shall be offset by the elimination of existing costs associated with at least two prior regulations.

- 3. Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017). This order creates a structure for identifying opportunities for regulatory reform in federal agencies. It requires agencies to appoint a Regulatory Reform Officer to implement regulatory reform initiatives, requires agencies to form a Regulatory Reform Task Force to evaluate existing regulations and, where appropriate, to make recommendations to the agency head regarding their repeal, replacement, or modification.
- 4. Executive Order 13781, "Comprehensive Plan for Reorganizing the Executive Branch" (Mar. 13, 2017). This order sets forth a plan to improve the efficiency, effectiveness, and accountability of federal agencies, including, as appropriate, to eliminate or reorganize unnecessary or redundant federal agencies. It directs agencies to submit a proposed plan to OMB to reorganize each covered federal agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency. It also directs OMB to conduct outreach and request public comment on any proposed plan and to submit the proposed plan to the President.
- 5. Executive Order 13783, "Promoting Energy Independence and Economic Growth" (Mar. 28, 2017). This order directs the EPA Administrator to review the CPP, as well as related rules and Agency actions. It orders federal agencies to immediately review all agency actions that potentially burden the safe, efficient development of domestic energy

resources. It orders the review of the estimates of the Social Cost of Carbon (SCC), Nitrous Oxide, and Methane for the purpose of Regulatory Impact Analyses. It also disbands the Interagency Working Group on the Social Cost of GHG and ordered the withdrawal of certain technical documents related to SCC. Finally, it rescinds certain prior energy and climate-related Presidential executive orders, memos, and regulatory actions and orders a review of regulations related to U.S. oil and gas development.

- 6. Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 15, 2017). This order directs that there be "One Federal Decision" for "major infrastructure projects," whereby a single federal agency serves as the lead point of contact for all National Environments Policy Act (NEPA) for issuing a single Record of Decision (ROD) on behalf of all involved agencies. It also requires that authorization decisions for the construction of a major infrastructure project be completed within 90 days of the issuance of a ROD by the lead Federal agency in most circumstances, and "not more than an average of approximately 2 years" after issuance of the Notice of Intent (NOI) to prepare a NEPA Environmental Impact Statement (EIS) or "other benchmark deemed appropriate by the Director of OMB."
- 7. Executive Order 13795, "Implementing An America-First Offshore Energy Strategy" (Apr. 28, 2017). This order requires the Department of Commerce to review all designations and expansions of National Marine Sanctuaries and Marine National Monuments within the 10-year period prior to the date of the order. It requires the Department of the Interior and Commerce to review numerous rules and guidance pertaining to off-shore energy development for potential revisions or withdrawal.

8. Presidential Memorandum, "Promoting Domestic Manufacturing and Job Creation - Policies and Procedures Relating to Implementation of Air Quality Standards" (Apr. 12, 2018). This memorandum directs the EPA Administrator to take specific actions to ensure efficient and cost-effective implementation of the NAAQS program, including with regard to permitting decisions for new and expanded facilities, and with respect to the Regional Haze Program. These actions are intended to ensure that "EPA carries out its core missions of protecting the environment and improving air quality in accord with statutory requirements, while reducing unnecessary impediments to new manufacturing and business expansion essential for a growing economy."

### **CURRENT STATUS OF SELECTED EPA REGULATORY REFORM EFFORTS**

EPA's regulatory reform actions following the above executive directives are summarized as follows:

#### 1. Clean Power Plan

On August 31, 2018, EPA published a proposed rule known as the Affordable Clean Energy or "ACE" rule, which is the Trump Administration's replacement for the Obama Administration's CPP regulations. See EPA, Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations: Revisions to New Source Review Program; Proposed rule, 83 Fed. Reg. 44746 (Aug. 31, 2018).

The proposed ACE rule includes revised emission guidelines for the development, submittal, and implementation of state plans to reduce greenhouse gas (GHG) emissions from certain Electric Generating Units (EGUs). The notice states that the Agency is proposing to determine that heat rate improvement measures are the "best system of emission reduction" (BSER) for existing coal-fired EGUs. The notice alsoproposes new regulations for the

implementation of emission guidelines that apply to this source category and any future emission guidelines issued, and proposes revisions to the New Source Review (NSR) permitting program to support the implementation of efficiency projects at EGUs without triggering NSR. EPA is taking comments on the proposed ACE rule through October 30, 2018.

#### 2. Ozone NAAOS

EPA has stated that it is working to review and reform the NAAQS program consistent with the Administration's commitment to regulatory reform, cooperative federalism, and domestic manufacturing (as articulated under the April 2018 Executive Memorandum summarized above and in a "Back-to-Basics" memorandum issued by EPA in response in May 2018). These efforts include a focus on getting "back-to-basics" for NAAQS setting, designations, and implementation.

Such efforts have been implicated in the Agency's review and reconsideration of EPA's October 2015 rule that reduced the ozone NAAQS from 75 parts per billion (ppb) to 70 ppb. Although D.C. Circuit litigation over this decision was held in abeyance for a period of time after the new administration took office, it has recently been reactivated and oral argument has been set for December 18. Importantly, the 2015 ozone standard was not stayed. Thus, under the requirements of the CAA, EPA has been implementing the standard, including by identifying non-attainment areas.

Recently, EPA announced that it has decided against reconsidering the 2015 ozone NAAQS, opting instead to evaluate concerns identified in its expedited review of the 2015 standard under the EPA Back-to-Basics memorandum. Under that memorandum, EPA staff was directed to begin the next ozone NAAQS review so that EPA will be ready to finalize any

Illustrating the complexity of EPA's task, issues that are expected to be raised in the next review include issues that were at play in the issuance of the 2015 ozone standard, including, whether the 70-ppb standard should be tightened to 65 or 60 ppb, transparency in relying on studies where the underlying data is not publicly available, proximity of the standard to high background ozone levels, EPA's focus on individual responses in studies designed to evaluate group means, increased uncertainty regarding health effects at lower exposure levels and whether failure to account for that in standard-setting makes revision inappropriate, and whether the secondary standard should be set at a different level than the primary standard; and more.

### 3. Risk Management Program.

On May 30, 2018, EPA issued a proposed rule, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule, 83 Fed. Reg. 24,850 (May 30, 2018) (2018 Proposed RMP Rule) that would rescind or substantially modify provisions added to the RMP regulations via a final rule issued in January 2017 at the end of the Obama administration (2017 RMP Amendments) relating to safer technology and alternatives analyses, third-party audits, incident investigations, information availability, and several other areas. EPA also proposes modifications to provisions of the 2017 RMP Amendments relating to local emergency coordination and emergency exercises and the compliance dates for these provisions.

\*Commenters on the 2015 exone standard have raised a mamber of issues including, whether the 70-pph standard should be tightened to 65 or 60-pph lack of transparency in relying on studies where the underlying data is not publicly available; the proximity of the standard to high background exone levels; EPA's focus on individual responses in studies designed to evaluate group means, increased uncertainty regarding health effects at lower appoints whather failure to account for that is standard setting makes revision amppropriate, whether the secondary standard should be estat a different level than the primary standard, and more.

Commented [A2]: Is this footnote necessary? Seems more detailed than the balance of the paper.

I was trying to show the complexity of what EPA is facing. Does it work in the text? Open to deleting. I tried to be balanced – putting on some of the issues for both sides.

EPA's efforts at reviewing and potentially rescinding or modifying the 2017 RMP Amendments have been complicated by the recent decision by the D.C. Circuit in *Air Alliance Houston v. EPA* (D.C. Cir. Case No. 17-1155) vacating a final rule issued by the Agency in June 2017 to delay the effective date of the 2017 RMP Amendments (the Delay Rule), which had not yet taken effect when the Trump administration took office. The Delay Rule was intended to allow the Agency "to conduct a reconsideration proceeding and to consider other issues that may benefit from additional comment." 83 Fed. Reg. 24,855. The D.C. Circuit issued the mandate in this case on September 21, the Delay Rule has been vacated and some provisions of the 2017 RMP Amendments are again effective even though EPA has not yet fully considered comments on the 2018 Proposed RMP Rule or issued a replacement rule. Given the complexity of the 2017 RMP Amendments and the pending substantial modifications of the regulation, there is much uncertainty in this program.

### 4. GHG Emissions Standards for Passenger Vehicles and Light Trucks.

On August 24, 2018, EPA and the National Highway Traffic Safety Administration (NHTSA) issued a joint proposal to amend certain existing Corporate Average Fuel Economy (CAFE) and tailpipe carbon dioxide (CO<sub>2</sub>) emissions standards for passenger cars and light duty trucks and establish new standards for model years (MY) 2021 through 2026. NHTSA/EPA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Notice of Proposed Rulemaking*, 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("SAFE Vehicles Proposed Rule"). The proposal, if finalized, would make less stringent CAFE and CO<sub>2</sub> emissions standards for MY 2022-2025 that were preliminarily issued by NHTSA and EPA, respectively, in a 2012 joint rule. In conjunction with these changes, EPA proposes to revoke a 2013 waiver of preemption under CAA Section 209, which allowed California to implement its Advanced Clean Car (ACC) regulations setting GHG emissions standards for MY

2017-2025. EPA also proposes to finalize its related findings that if state standards are preempted under the Energy Policy and Conservation Act (EPCA), EPA cannot issue a waiver of preemption under Section 209(b). EPA further proposes that because GHGs are not subject to air quality standards under the statute, regardless of whether California could obtain a waiver, other states cannot opt into the California program. NHTSA proposes to finalize a finding that California's ACC program—in particular, its GHG and Zero-Emissions Vehicle (ZEV) requirements—is preempted under EPCA.

The joint proposal follows over a decade of debate and regulatory actions over the relationship between EPA and NHTSA with respect to emissions and fuel economy standard-setting under their respective statutory authorities. Also at issue is the proper role of California – which was granted the ability to obtain a waiver from the generally applicable preemption of state standards in CAA Section 209 provided statutory criteria are met.

### STATE RESPONSES TO DATE

The response from the states to the above initiatives has been varied, in part, depending on the views of a particular state on the substantive content of the reform initiative, but also on other factors that may be particular to a given state. As a general rule, under the CAA, states have a number of options in terms of their responses to federal regulatory reform initiatives. Many states support such initiatives and have formed coalitions to voice their support in rulemakings, via amicus participation in litigation, or otherwise. Similarly, states that oppose such initiatives often either initiate or intervene to defend them in litigation brought by interest groups or other states. States also may use their regulatory powers to counteract any perceived relaxing of environmental and safety protections at the federal level. An interesting example of this latter approach is California's current proposal to rescind a provision in its motor vehicle emissions regulations that it previously promulgated in a compromise over the debate over

federal GHG emissions standards, which provides that automakers' compliance with federal GHG emissions standards would be 'deemed to comply' with California's emissions standards. California's proposal, if finalized, would revise this 'deemed-to-comply' provision by limiting its scope to compliance with the GHG emissions standards enacted by EPA under the previous administration. This action, taken in response to the EPA/NHTSA joint proposal in the SAFE Vehicles Proposed Rule, illustrates the interesting interplay between state and federal regulatory reform efforts.

# **CONCLUSION**

Whether the current regulatory reform efforts will stand the test of time, or survive judicial challenge, will be dictated by future events. What is clear now is that the states with their own regulatory and litigation responses will have something to say about it.

American Bar Association
Section on Environment, Energy, and Resources
Fall Conference 2018

San Diego, California

Panel Paper: Deregulation in Focus: The Clean Air Act and States<sup>1</sup>

October 19, 2018

Elections have consequences. That's true regardless of the party that is currently sitting

in the White House or which party holds a majority in the Senate or House of Representatives.

Since the 2016 election, as with all national elections where a shift in the party of the president

occurs, steps are taken by the new administration to evaluate the policies and regulations of the

prior administration and to make adjustments that the new president deems appropriate. The

focus of this panel is steps that the current administration undertook in this regard with respect to

the Clean Air Act (CAA), with additional focus on how the states have reacted. The purpose of

this paper, which was jointly prepared by all panelists is to provide background on some of the

regulations that have been addressed by the Trump Administration to facilitate a productive

discussion.

A number of CAA regulatory programs have been implicated in the efforts of the Trump

Administration to evaluate President Obama's regulatory programs and determine if changes are

appropriate. While President Trump ran on a platform that promoted jobs and business, his

campaign speeches also supported clean air and clean water.<sup>2</sup> Since President Trump took

<sup>1</sup> The following panelists contributed to this paper: Jonathan D. Brightbill, Shannon S. Broome, David Pettit, Clint Woods. The characterization of any particular position is not to be attributed to a particular author or the author's

employer.

<sup>2</sup> Further, the allocation of resources at the EPA is not entirely within any administration's control—statutes impose mandatory duties that require the agency to issue certain regulations according to specified schedules. In the case of the CAA Amendments of 1990, Congress specified many deadlines, and since that time, EPA has tried to meet those deadlines, but issuing regulations on complex subjects like residual risk that may exist following implementation of hazardous air pollutant control programs is not necessarily straightforward and these complexities led to EPA falling behind in some of its mandatory duties. Indeed, the Trump Administration inherited a substantial backlog of residual risk regulations that should have been issued but were not. Those regulations are now subject to court-

office, EPA has worked to review the actions of the prior administration, with particular focus on actions taken shortly before the presidential transition, and as a result, has issued proposals to revise, and in some cases rescind, regulatory programs. Under the CAA, we focus below on the background of the Clean Power Plan (CPP), which has been proposed to be replaced by the Affordable Clean Energy (ACE) regulation, the January 2017 Amendments to the CAA Section 112 Risk Management Program (RMP) regulations, which have been proposed to be substantially revised—and largely rescinded, the EPA greenhouse gas (GHG) standards with respect to state authority under the CAA to regulate vehicle GHGsfor motor vehicles and light trucks, and the National Ambient Air Quality Standards (NAAQS) program, where EPA is evaluating the ozone NAAQS which was well into the litigation process when the presidential transition occurred and continues to be implemented which decisions are made regarding its status.

### **EXECUTIVE INITIATIVES ON REGULATION**

Soon after taking office in the beginning of 2017, President Trump issued a number of Executive Orders and Presidential Memoranda aimed at regulatory reform, cooperative federalism, aiding domestic manufacturing and energy production, and supporting infrastructure development. These executive actions are briefly described as follows:

1. Presidential Memorandum, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing" (Jan. 24, 2017). This memorandum directs the executive branch to reduce burdens on manufacturing by streamlining permitting. It directs the Department of Commerce to conduct outreach and request public comment on the impact of federal regulations on domestic manufacturing, and to develop a permit

ordered deadlines and of course, EPA must comply with court orders and allocate the resources to issue those regulations.

streamlining action plan within 60 days after the close of the comment period and to submit it to the President identifying priority actions and recommended deadlines.

- 2. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs" (Jan. 30, 2017). This order requires agencies to identify two regulations for repeal upon each new regulatory proposal and to ensure that the total incremental cost of new regulation to be finalized in fiscal year 2017 is zero. In furtherance of this requirement, the order provides that any new incremental costs associated with new regulations shall be offset by the elimination of existing costs associated with at least two prior regulations.
- 3. Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017). This order creates a structure for identifying opportunities for regulatory reform in federal agencies. It requires agencies to appoint a Regulatory Reform Officer to implement regulatory reform initiatives, requires agencies to form a Regulatory Reform Task Force to evaluate existing regulations and, where appropriate, to make recommendations to the agency head regarding their repeal, replacement, or modification.
- 4. Executive Order 13781, "Comprehensive Plan for Reorganizing the Executive Branch" (Mar. 13, 2017). This order sets forth a plan to improve the efficiency, effectiveness, and accountability of federal agencies, including, as appropriate, to eliminate or reorganize unnecessary or redundant federal agencies. It directs agencies to submit a proposed plan to OMB to reorganize the agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency, and it directs OMB to conduct outreach and request public comment on proposed plan, and to submit the proposed plan to the President.

- 5. Executive Order 13783, "Promoting Energy Independence and Economic Growth" (Mar. 28, 2017). This order directs the EPA Administrator to review the CPP, as well as related rules and Agency actions. It orders federal agencies to immediately review all agency actions that potentially burden the safe, efficient development of domestic energy resources. It orders the review of the estimates of the Social Cost of Carbon (SCC), Nitrous Oxide, and Methane for Regulatory Impact Analysis, disbands the Interagency Working Group on the Social Cost of GHG and ordered the withdrawal of certain technical documents related to SCC. Finally, it rescinds certain energy and climate-related prior Presidential executive orders, memos, and regulatory actions and orders a review of regulations related to U.S. oil and gas development.
- 6. Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 15, 2017). This order directs that there be "One Federal Decision" for "major infrastructure projects," whereby a single federal agency serves as the lead point of contact for all NEPA review and customarily issues a single Record of Decision (ROD) on behalf of all involved agencies. It also requires that authorization decisions for the construction of a major infrastructure project be completed within 90 days of the issuance of a ROD by the lead Federal agency in most circumstances, and "not more than an average of approximately 2 years" after issuance of the Notice of Intent (NOI) to prepare a NEPA Environmental Impact Statement (EIS) or "other benchmark deemed appropriate by the Director of OMB."
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Monuments within the 10-year period prior to the date of the order. It requires the Department of the Interior and Commerce to review numerous rules and guidance pertaining to off-shore energy development for potential revisions or withdrawal.

8. Presidential Memorandum, "Promoting Domestic Manufacturing and Job Creation

- Policies and Procedures Relating to Implementation of Air Quality Standards" (Apr. 12, 2018). This memorandum directs the EPA Administrator to take specific actions to ensure efficient and cost-effective implementation of the NAAQS program, including with regard to permitting decisions for new and expanded facilities, and with respect to the Regional Haze Program. These actions are intended to ensure that "EPA carries out its core missions of protecting the environment and improving air quality in accord with statutory requirements, while reducing unnecessary impediments to new manufacturing and business expansion essential for a growing economy."

# CURRENT STATUS OF SELECTED EPA REGULATORY REFORM EFFORTS

EPA's regulatory reform actions following the above executive directives are summarized as follows:

#### 1. Clean Power Plan

On August 31, 2018, EPA published a proposed rule known as the Affordable Clean Energy or "ACE" rule, which is the Trump Administration's replacement of the Obama Administration's CPP regulations. See EPA, Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations: Revisions to New Source Review Program; Proposed rule, 83 Fed. Reg. 44746 (Aug. 31, 2018).

The proposed ACE rule includes revised emission guidelines for the development, submittal, and implementation of state plans to reduce greenhouse gas (GHG) emissions from

certain Electric Generating Units (EGUs). The notice states that the Agency is proposing to determine that heat rate improvement measures are the "best system of emission reduction" (BSER) for existing coal-fired EGUs, proposes new regulations for the implementation of emission guidelines that apply to this source category and any future emission guidelines issued, and proposes revisions to the New Source Review (NSR) permitting program to support the implementation of efficiency projects at EGUs without triggering the NSR requirements. EPA is taking comments on the proposed ACE rule through October 30, 2018.

# 2. Ozone NAAQS

EPA has stated that consistent with the Administration's commitment to regulatory reform, cooperative federalism, and domestic manufacturing (as articulated under the April 2018 Executive Memorandum summarized above and in a "Back-to-Basics" memorandum issued by EPA in response in May 2018), it is working to review and reform NAAQS program. These efforts include a focus on getting "back-to-basics" for NAAQS setting, designations, and implementation.

Such efforts have been implicated in the Agency's review and reconsideration of EPA's October 2015 rule that reduced the ozone NAAQS from 75 parts per billion (ppb) to 70 ppb. Although D.C. Circuit litigation over this decision was held in abeyance for a period of time after the new administration took office, it has recently been reactivated and importantly, the 2015 ozone standard was not stayed. Thus, under the requirements of the CAA, EPA has been proceeding to implement the standard – including the process of identifying of non-attainment areas.

Recently, EPA announced that it has decided against reconsidering the 2015 ozone NAAQS, opting instead to evaluated concerns that it may have as part of an expedited review of the 2015 standard that was mandated in the EPA Back-to-Basics memorandum. Under that

memorandum, EPA staff was directed to begin the next ozone NAAQS review so that EPA will be ready to finalize any necessary revisions to the standard by the CAA-required five-year deadline in October 2020.<sup>3</sup>

# 3. Risk Management Program.

On May 30, 2018, EPA issued a proposed rule, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 83 Fed. Reg. 24,850 (May 30, 2018) (2018 Proposed RMP Rule) that would rescind or substantially modify provisions added to the RMP regulations via a final rule (2017 RMP Amendments) issued in January 2017 at the end of the Obama administration. The 2018 Proposed RMP Rule would rescind provisions in the 2017 RMP Amendments relating to safer technology and alternatives analyses, third-party audits, incident investigations, information availability, and several other regulatory changes made in the 2017 rule. EPA is also proposing modifications to provisions of the 2017 RMP Amendments relating to local emergency coordination and emergency exercises and the compliance dates for these provisions.

EPA's efforts at reviewing and potentially rescinding or modifying the 2017 RMP Amendments have been complicated by the recent decision by the D.C. Circuit in *Air Alliance Houston v. EPA* (D.C. Cir. Case No. 17-1155) vacating a final rule (the Delay Rule) issued by the Agency in June 2017 to delay the effective date of the 2017 RMP Amendments, which had not yet taken effect when the Trump administration took office. The Delay Rule was intended to allow the Agency "to conduct a reconsideration proceeding and to consider other issues that may

3 Commenters on the 2015 ozone standard have raised a number of issues including: whether the 70-ppb standard should be tightened to 65 or 60 ppb; lack of transparency in relying on studies where the underlying data is not publicly available; the proximity of the standard to high background ozone levels; EPA's focus on individual responses in studies designed to evaluate group means; increased uncertainty regarding health effects at lower

exposure levels and whether failure to account for that in standard-setting makes revision inappropriate; whether the secondary standard should be set at a different level than the primary standard; and more.

benefit from additional comment." 83 Fed. Reg. 24.855. Although the D.C. Circuit mandate has not issued in *Air Alliance*, and thus the Delay Rule is still in effect, vacatur of the Delay Rule could cause some of the provisions of the 2017 RMP Amendments to become effective before EPA has had the chance to consider comments on the 2018 Proposed RMP Rule and to issue a replacement rule. Given the complexity of the 2017 RMP Amendments and the pending substantial modifications of the regulation, there is much uncertainty in this program.

# 4. GHG Emissions Standards for Passenger Vehicles and Light Trucks.

On August 24, 2018, EPA and the National Highway Traffic Safety Administration (NHTSA or the Administration) issued a joint proposal to amend certain existing Corporate Average Fuel Economy (CAFE) and tailpipe carbon dioxide (CO<sub>2</sub>) emissions standards for passenger cars and light duty trucks and establish new standards for model years (MY) 2021 through 2026. NHTSA/EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Notice of Proposed Rulemaking, 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("SAFE Vehicles Proposed Rule"). The proposal, if finalized, would make less stringent CAFE and CO<sub>2</sub> emissions standards for MY 2022-2025 that were preliminarily issued by NHTSA and EPA, respectively, in a 2012 joint rule. In conjunction with these changes, EPA proposes to revoke a 2013 waiver of preemption under CAA Section 209, which allowed California to implement its Advanced Clean Car (ACC) regulations setting GHG emissions standards for MY 2017-2025. EPA also proposes to finalize its related findings that if state standards are preempted under Energy Policy and Conservation Act (EPCA), EPA cannot issue a waiver of preemption under Section 209(b) and because GHGs are not subject to air quality standards under the statute, regardless of whether California could obtain a waiver, other states cannot opt into the California program. NHTSA proposes to finalize a finding that

California's ACC program—in particular, its GHG and Zero-Emissions Vehicle (ZEV) requirements—is preempted under EPCA.

The joint proposal follows over a decade of debate and regulatory actions over the relationship between EPA and NHTSA emissions and fuel economy standard-setting under their respective statutory authorities, as well as the proper role of California – which was granted the ability to obtain a waiver from the generally applicable preemption of state standards in CAA Section 209 when specified statutory criteria are met.

# STATE RESPONSES TO DATE

The response from the states to the above initiatives has been varied, in part, depending on the views of a particular state on the substantive content of the reform initiative, but also on other factors that may be particular to a given state. As a general rule, under the CAA, states have a number of options in terms of their responses to federal regulatory reform initiatives. Many states support such initiatives and have formed coalitions to voice their support in rulemaking proceedings, via amicus participation in litigation, or otherwise. Similarly, states who oppose such initiatives often either initiate or intervene to defend them in litigation brought by interest groups or other states. States may also use their regulatory powers to counteract any perceived relaxing of environmental and safety protections at the federal levels. An interesting example of this latter approach is California's current proposal to rescind a provision in its motor vehicle emissions regulations that it previously promulgated in a compromise over the debate over federal GHG emissions standards, which provided that automakers' compliance with federal GHG emissions standards would be 'deemed to comply' with California's emissions standards. California's proposal, if finalized, would revise this 'deemed-to-comply' provision by revising it to limit its scope to compliance with the GHG emissions standards enacted by EPA under the previous administration. This action, taken in response to the EPA/NHTSA joint

proposal in the SAFE Vehicles Proposed Rule, illustrates the interesting interplay between state and federal regulatory reform efforts.

# **CONCLUSION**

Whether the current regulatory reform efforts will stand the test of time, or survive judicial challenge, will be dictated by future events. What is clear now is that the states with their own regulatory and litigation responses will have something to say about it.

#### Message

**Sent**: 8/27/2019 5:18:57 PM

To: Ross Eisenberg [REisenberg@nam.org]

CC: Shoaff, John [Shoaff.John@epa.gov]; Erika Sasser (Sasser.Erika@epa.gov) [Sasser.Erika@epa.gov]

Subject: RE: Cost-benefit air regulation

Hi Ross. Thanks for reaching out. I'm sure we can set up a time to meet over the next few weeks. I'm cc'ing John Shoaff whose group is coordinating this effort for Anne, and Erika Sasser whose division will be leading this effort for us here in OAQPS. Since you and John are in DC, we can have you at our DC offices and Skype RTP. Of course if you want to visit beautiful NC we can also work that out. We'll look through our calendars and give you a few date/time options tomorrow and take it from there.

From: Ross Eisenberg <REisenberg@nam.org>
Sent: Tuesday, August 27, 2019 12:17 PM
To: Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>

Subject: Cost-benefit air regulation

Peter,

My colleagues and I met with Anne Idsal recently to discuss the air office's rule to implement Administrator Wheeler's cost-benefit memorandum. We've done some thinking on existing EPA and OMB authorities that we believe would be a helpful part of such a rule. She suggested we talk with you and your team about it. Would you possibly have time for a meeting in the next few weeks? We would be happy to come down to RTP.

### Ross Eisenberg

Vice President, Energy and Resources Policy

National Association of Manufacturers Direct: 202.637.3173

Mobile: 703.517.1655

Email: reisenberg@nam.org

#### Message

From: Shoaff, John [Shoaff.John@epa.gov]

**Sent**: 8/28/2019 3:02:49 PM

To: Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Ross Eisenberg [REisenberg@nam.org]

CC: Sasser, Erika [Sasser.Erika@epa.gov]
Subject: RE: Cost-benefit air regulation

Ross,

Thanks for following up/reaching out on this. Happy to schedule something here and connect with OAQPS via videoconference if that might work. Will work through Clint's scheduler (Susan Jacks) so you should see an invitation in the near term from her for a meeting in the next few weeks. Please let me know if you've any questions. Best,

John

JOHN SHOAFF | DIRECTOR

OFFICE OF AIR POLICY & PROGRAM SUPPORT (OAPPS)

OFFICE OF AIR & RADIATION | U.S. EPA | WJC NORTH 5442-C

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From: Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>

**Sent:** Tuesday, August 27, 2019 3:15 PM **To:** Ross Eisenberg <a href="mailto:Risenberg@nam.org">Risenberg@nam.org</a>

Cc: Shoaff, John <Shoaff.John@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>

Subject: RE: Cost-benefit air regulation

Hi Ross. Thanks for reaching out. I'm sure we can set up a time to meet over the next few weeks. I'm cc'ing John Shoaff whose group is coordinating this effort for Anne, and Erika Sasser whose division will be leading this effort for us here in OAQPS.

Since you and John are in DC it may be easier for you to come to our DC offices and we here at RTP can connect by video. Of course if you want to visit RTP we can also easily work that out. We'll look through our calendars and give you a few date/time options tomorrow and take it from there.

Hope this works for you.

From: Ross Eisenberg <a href="mailto:REisenberg@nam.org">REisenberg@nam.org</a> Sent: Tuesday, August 27, 2019 12:17 PM
To: Tsirigotis, Peter <a href="mailto:Tsirigotis.Peter@epa.gov">Tsirigotis.Peter@epa.gov</a>

Subject: Cost-benefit air regulation

Peter,

My colleagues and I met with Anne Idsal recently to discuss the air office's rule to implement Administrator Wheeler's cost-benefit memorandum. We've done some thinking on existing EPA and OMB authorities that we believe would be a helpful part of such a rule. She suggested we talk with you and your team about it. Would you possibly have time for a meeting in the next few weeks? We would be happy to come down to RTP.

Ross Eisenberg

Vice President, Energy and Resources Policy National Association of Manufacturers

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